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Supreme Court, U.S.
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No. 03-6696

In The

Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,

Petitioners,

v.

DONALD RUMSFELD, Secretary of Defense, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX
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Order (Jan. 9, 2004) 534

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, and
ESAM FOUAD HAMDI,
As Next Friend of Yaser
Esam Hamdi,

Petitioners,

v. **CIVIL ACTION NO. 2:02cv439**

DONALD RUMSFELD, and
COMMANDER W.R. PAULETTE,

Respondents.

ORDER

(Filed Aug. 16, 2002)

This case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal, and without access to a lawyer. Despite the fact that Yaser Esam Hamdi ("Hamdi") has not been charged with an offense nor provided access to counsel, the Respondents contend that his present detention is lawful because he has been classified as an enemy combatant. Respondents' Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus ("Resp. Brief"), at 9. In denying the Respondents' Motion to Dismiss, the Court of Appeals for the Fourth Circuit rejected the Respondents' contention that the government's determination of Hamdi's status was beyond judicial review stating, "[i]n dismissing . . . with no

meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi v. Rumsfeld*, No. 02-6895, 2002 WL 1483908, at *5 (4th Cir. July 12, 2002) (emphasis added).

In this Court's hearing on the matter on August 13, 2002, the Respondents conceded that their determination of Hamdi's status was subject to judicial review. However, the Respondents argued that the Mobbs Declaration that it attached to its Response, in and of itself with no further evidence of any kind, was a sufficient factual basis to provide this Court with information adequate to dismiss the writ of habeas corpus. For the reasons stated below, this Court finds the Mobbs Declaration insufficient and once again **ORDERS** the Respondents to submit to the Court the materials previously requested in its July 31, 2002, Order, together with the screening criteria utilized to determine the status of Hamdi with the name(s) and address(es) of the persons who made the determination. The Respondents' Motion for Relief from this Court's production order of July 31, 2002, filed August 5, 2002, is **DENIED**. This Court is highly cognizant of the Respondents' concerns regarding any national security implications of the requested materials. The Court reiterates that the materials are to be produced solely for in camera review, *ex parte*, by the Court, in order to insure that the documents will in no possible way affect national security. The Court **ORDERS** that the sealed documents be produced by 4:30 p.m. on Wednesday, August 21, 2002, to this Division of this Court for the Judge's in camera review.

Background

On September 11, 2001, the al Qaida terrorist network launched an attack on the United States resulting in approximately 3,000 fatalities. Seven days later, Congress responded by authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The President subsequently ordered United States armed forces to Afghanistan to subdue al Qaida and the governing Taliban regime that was supporting it. In late 2001, the Respondents contend that Yaser Esam Hamdi surrendered to Northern Alliance forces that were acting in conjunction with American forces during these military operations.

Although the circumstances of Hamdi's surrender and detention are anything but clear, he was apparently classified as an "enemy combatant" that met certain "screening criteria"[1] and turned over to U.S. military control. Hamdi was transferred to Camp X-Ray at the Naval Base in Guantanamo Bay, Cuba together with hundreds of other detainees of like circumstances. It appears that the government, realizing that Hamdi was

[1] The Respondents have not produced the screening criteria to this Court and have stated that the criteria are classified. In its Response, filed on July 25, 2002, the Respondents went on to suggest that it could submit to this Court a copy of the screening criteria *ex parte* and under seal. Resp. Brief, at 3 n.1. However, in the hearing conducted by this Court on August 13, 2002, the Respondents indicated that they are now unwilling to produce any additional information.

born in the United States, looked upon him somewhat differently. For reasons that are still unclear, Hamdi was subsequently transferred to the Norfolk Naval Station Brig, Norfolk, Virginia, U.S.A. in April 2002.

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia, Frank Dunham, filed a habeas corpus petition, naming as petitioners both Hamdi and himself as Hamdi's next friend. After holding a hearing on May 29, 2002, this Court concluded that the habeas corpus petition was properly filed and ordered that Hamdi be allowed to meet with the Federal Public Defender on June 1, 2002. On May 31, 2002, the Respondents filed a motion in the Court of Appeals for the Fourth Circuit for a stay pending appeal of this Court's access order on the grounds that there was an insufficient relationship between Hamdi and the Federal Public Defender. The Court of Appeals granted the Respondents' Motion.

While the Federal Public Defender's petition was submitted to the appeals court, Esam Fouad Hamdi, the detainee's father, filed a separate petition for a writ of habeas corpus naming as petitioners both Yaser Esam Hamdi and himself as next friend. On June 11, 2002, this Court found that Hamdi's father had properly filed his habeas petition as next friend, appointed the Federal Public Defender as counsel for Petitioners, and ordered the Respondents to allow counsel access to Hamdi. The Respondents then filed a motion for stay in the Court of Appeals for the Fourth Circuit pending appeal of the June 11, 2002, Order. On June 14, 2002, the Court of Appeals granted the Respondents' Motion for a stay of this Court's June 11, 2002, Order and further ordered a stay of all proceedings before this Court in connection with Hamdi.

On June 26, 2002, the appellate court dismissed the petition brought by Frank Dunham finding an insufficient relationship between Mr. Dunham and the detainee. *Hamdi v. Rumsfeld*, No. 02-6827, slip op. at 2 (4th Cir. June 26, 2002). The appeals court further held that Hamdi's father had a sufficient relationship with Hamdi and had filed a valid next friend petition. *See id.* at 3 n.1.

On July 12, 2002, the Court of Appeals ruled on the Respondents' Appeal regarding this Court's June 11, 2002, access Order. *Hamdi v. Rumsfeld*, No. 02-6895, 2002 WL 1483908 (4th Cir. July 12, 2002). In their appeal, the Respondents argued that the habeas petition should be dismissed in its entirety, or alternatively, the case should be reversed and remanded to this Court for further proceedings. The appeals court declined to dismiss the petition, finding that such dismissal would be premature. *Id.* at *5. Instead, the Court of Appeals reversed this Court's June 11, 2002, Order and remanded the case for further proceedings. *Id.* at 2. In reversing, the appellate court held that this Court failed to extend to the political branches the appropriate deference in matters of foreign policy and national security. *Id.* at *3. The appellate court then directed this Court to consider "the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Id.* at *5-6.

On August 8, 2002, the Court of Appeals for the Fourth Circuit dissolved its stay order of June 14, 2002. In doing so, the Appeals Court stated "that the district court may proceed in strict compliance with our July 12, 2002 decision." August 8, 2002 Order at 1. The Court of Appeals further directed this Court to "consider the sufficiency of

the Mobbs Declaration as an independent matter before proceeding further." *Id.* at 2.

In response, this Court analyzed the Mobbs Declaration, considered briefs submitted from both the Respondents and the Federal Public Defender, and heard oral argument on August 13, 2002, from both sides. In strict compliance with the Court of Appeals August 8, 2002 Order, the sole purpose of the hearing was to determine whether the Mobbs Declaration, *standing alone*, was sufficient justification for a person born in the United States to be held without charges, incommunicado, in solitary confinement, and without access to counsel on U.S. soil.

Discussion

This case represents the delicate balance that must be struck between the Executive's authority in times of armed conflict and the procedural safeguards that our Constitution provides for American citizens detained in the United States. Due to the uncertainty regarding Hamdi's status whether he was an enemy combatant, was an unlawful enemy combatant, or just a bystander, the legal considerations are further complicated by the protections potentially afforded by the international law of war as expressed in the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949. 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"), to which the United States is a signatory. Depending on Hamdi's status, the joint service regulations governing the detention of captured enemy combatants or others may also be implicated. *See* Joint Service Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*

(Oct. 1, 1997) (hereinafter Joint Service Regulation). These regulations "provide[] policy, procedures, and responsibility for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of U.S. Armed Forces." *Id.* at 1. The exact legal force of these regulations is not now determined, but the regulation states that it "implements international law, both customary and codified, relating to EPW, RP, CI, and ODs which includes those persons held during military operations other than war." *Id.* It specifically lists the GPW as one of the relevant treaties in its determination of international law. *Id.* At the very least, the Joint Service Regulation illustrates the U.S. military's position regarding its obligations under the GPW. Any decision regarding the legal effect of the GPW or the Joint Regulations would be premature at this point in the proceedings as it is necessary to first develop a factual background by which Hamdi's classification may be evaluated.[2] Under the facts that the Court has before it at

[2] The Joint Service Regulations as well as the treaty indicate that where a detainee's status may be in doubt that a military tribunal, appointed by the general courts-martial convening authority, must determine whether the detainee is a Prisoner of War. *See* Joint Service Regulation 1-6(b) ("A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists."); Joint Service Regulation Glossary ("Other Detainee – Persons in the custody of the U.S. Armed Forces who have not been classified as an EPW (article 4, GPW), RP (article 33, GPW), or CI (article 78, GC), shall be treated as EPWs until a legal status is ascertained by competent authority."); GPW Art. 5 ("Should any doubt arise as to whether persons, having committed a belligerent act and

(Continued on following page)

this time, the Respondents have not shown that the requirements of the GPW nor the Joint Service Regulations, which apply regardless of the treaty, have been complied with. In light of the cautious procedures that the Court of Appeals outlined for this Court to follow, any determination of these issues would be premature as it is necessary to first develop a factual background.

The judiciary has traditionally shown "great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." *Hamdi v. Rumsfeld*, 2000 WL 1483908, at *3. The Supreme Court has made it clear that the President is afforded deference when exercising his authority as Commander in Chief. *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942). Deference is proper because of the Executive's special competency, and constitutional responsibility, over the conduct of overseas military operations. Deference to the President is particularly appropriate when Congress has authorized the Executive to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). This deference extends to military designations of individuals

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having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.") (the GPW does not allude to general courts-martial convening authority).

as enemy combatants. *Hamdi v. Rumsfeld*, 2000 WL 1483908, at *4.

While it is clear that the Executive is entitled to deference regarding military designations of individuals, it is equally clear that the judiciary is entitled to a meaningful judicial review of those designations when they substantially infringe on the individual liberties, guaranteed by the United States Constitution, of American citizens. The scope of "any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, against additional unprovoked attack." *Id.* at *5. The standard of judicial inquiry must also recognize that the "concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of [executive] power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which sets this Nation apart. . . . It would indeed by [sic] ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967).

The Due Process Clause of the Fifth Amendment prohibits the government from "depriving" any person of liberty "without due process of law." U.S. Const. Amend. V. While Petitioners concede that Hamdi's initial detention in a foreign land during a period of ongoing hostilities is not subject, for obvious reasons, to a due process challenge, Petitioners argue that the continuing indefinite imprisonment on U.S. soil, in solitary confinement, and without access to counsel violates the detainee's Fifth Amendment

rights. Petitioners' Traverse and Response to Respondents' Motion to Dismiss ("Pet. Brief"), at 20. For its part, the Respondents argue that Hamdi's due process rights have not been violated because of the "historical unavailability of any right to prompt charges or counsel for those held as enemy combatants." Resp. Brief, at 10. When asked during the August 13, 2002, hearing what, if any, constitutional protections Hamdi was entitled to, counsel for the Respondents responded that the Constitution applied to the same extent as "it did to the individual who was alleged to be an American citizen in the *Quirin* case." August 13, 2002, Hr'g Tr. at 7. Upon further questioning by the court, the Respondents' counsel conceded that the individual in *Ex parte Quirin* that it referred to was afforded access to counsel and the opportunity to defend himself before a military tribunal. *Id.* It is apparent that the defendant in *Quirin* to whom the Respondents referred was provided with a significantly broader measure of due process than Hamdi has received thus far. This Court finds that Hamdi is entitled to due process of law as provided by the Fifth Amendment to the United States Constitution.

The question then becomes whether the Respondents' classification of Hamdi's combatant status has violated his due process rights under the Constitution. The Respondents contend that the Mobbs Declaration is sufficient, by itself, to allow this Court to conduct a meaningful judicial review to insure that the government has not violated any of Hamdi's rights and protections. While recognizing the deference due to the Executive's decisions regarding combatant status classifications, the Court finds that a meaningful judicial review must, at a minimum, determine:

(1) Whether the government's classification of the detainee's status was determined pursuant to appropriate authority to make such determinations.

(2) Whether the screening criteria used to make and maintain the classification of an American born detainee held in the continental United States met sufficient procedural requirements as to be consistent with the Fifth Amendment's prohibition against governmental deprivation of life, liberty, or property without due process of law.

(3) On what basis has the government determined that the continuing detention of Hamdi without charges and without access to counsel serves national security.

(4) Whether the Geneva Treaty or the Joint Services Regulations required a different process.[3]

An examination of the Mobbs Declaration reveals that it falls far short of even these minimal criteria for judicial review. The Respondents produced the Mobbs Declaration as attachment 1 to its brief filed on July 25, 2002. The document is two pages long and consists of nine numbered paragraphs. The declaration is signed by a Michael H. Mobbs and dated July 24, 2002. A thorough examination of the Mobbs Declaration reveals that it leads to more questions than it answers.

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[3] Counsel for the Respondents indicate that the armed services did not have to follow the Joint Service Regulations when first taking Hamdi in custody. August 13, 2002, Hr'g Tr. 30, 31.

The declaration fails to address the nature and authority of Mr. Mobbs to review and make declarations on behalf of the Executive regarding Hamdi's classification. Paragraph 1 of the Mobbs Declaration states that Mr. Mobbs is a Special Adviser to the Undersecretary of Defense for Policy. Mobbs Decl. at 1. The declaration does not indicate what authority a "Special Advisor" has regarding classification decisions of enemy combatants. Indeed, the declaration does not indicate whether Mr. Mobbs was appointed by the President, is an officer of the United States, is a member of the military, or even a paid employee of the government. During the August 13, 2002, hearing, when asked to explain Mr. Mobbs' authority and role in Hamdi's classification as an enemy combatant, the Respondents' counsel was unable to do so. Tr. at 10. In a general way, the declaration never refers to Hamdi as an "illegal" enemy combatant. The term is used constantly in Respondents' Memorandum. Nor is there anything in the declaration about intelligence or the gathering of intelligence from Hamdi. There is a huge amount of this in legal arguments. There is nothing to indicate why he is treated differently than all the other captured Taliban. There is no reason given for Hamdi to be in solitary confinement, incommunicado for over four months and being held for some eight-to-ten months without any charges of any kind. This is clearly an unreasonable length of time to be held in order to bring criminal charges.[4] So obviously criminal charges are not contemplated.

[4] Confinement for 48 hours triggers the right to a preliminary hearing. *Riverside v. McLaughlin*, 500 U.S. 44 (1991).

In Paragraph 2 of the Mobbs Declaration, Mr. Mobbs claims a familiarity with the policies and procedures applicable to Hamdi's detention. He claims to have reviewed the relevant records and reports regarding Hamdi's detention and capture. Mobbs Decl. at 1. The declaration does not answer under whose authority and by what procedures Mr. Mobbs engaged in such a review. Nor does it explain whether Mr. Mobbs is responsible for supervising the classification decisions of others. These are important considerations for any meaningful judicial review because the Court must be able to determine whether the person(s) making the classification decision did so with the authority of the Executive and pursuant to the statutes, rules, and regulations pertaining to such matters.

The declaration is insufficient to determine whether the screening criteria used by the government in classifying Hamdi and in making the decision to transfer Hamdi to the Norfolk Naval Brig violated his Fifth Amendment rights to the due process of law or violated the law or regulations of the Country. In paragraph 3 of the declaration, Mr. Mobbs states that Hamdi was "affiliated with a Taliban military unit and received weapons training." *Id.* The declaration makes no effort to explain what "affiliated" means nor under what criteria this "affiliation" justified Hamdi's classification as an enemy combatant. The declaration is silent as to what level of "affiliation" is necessary to warrant enemy combatant status. These are crucial determinations for purposes of judicial review. It does not say where or by whom he received weapons

training or the nature and extent thereof.[5] Indeed, a close inspection of the declaration reveals that Mr. Mobbs never claims that Hamdi was fighting for the Taliban, nor that he was a member of the Taliban. Without access to the screening criteria actually used by the government in its classification decision, this Court is unable to determine whether the government has paid adequate consideration to due process rights to which Hamdi is entitled under his present detention.

In Paragraph 4 of the Mobbs Declaration, it indicates that Northern Alliance forces were engaged in battle with the Taliban. It does not say that the Taliban unit to which Hamdi was "affiliated" was ever in any battle while Hamdi's was "affiliated." *Id.* Nor does it identify the unit. Nor does it indicate who commanded the unit or the type of garb or uniform Hamdi may have worn when taken by the Northern Alliance. It further indicates after Hamdi "surrendered" that he kept his weapon.[6] He only gave up the weapon prior to being placed in prison. All the while he was under the care, custody and control of Northern Alliance forces. Whether the forces he surrendered to was led by a "war lord" or the unidentified unit to which he was "affiliated" was led by a "war lord" or whether the war lords changed sides is not set forth.

In paragraph 5 of the declaration, the U.S. interrogation team interviewed Hamdi while he was under the "Northern Alliance" control. It says that Hamdi identified

[5] Did someone give him a weapon and say "here's the safety and there's the trigger?"

[6] This doesn't sound like he was expected to fight or escape.

himself as a Saudi citizen who had been born in the United States.[7] Mr. Mobbs claims that during the interview, Hamdi admitted that he "entered Afghanistan the previous summer to train with and, *if necessary*, fight for the Taliban." *Id.* (emphasis added). The Court notes that the declaration does not quote from this alleged admission from Hamdi, but rather appears to be paraphrased. A possible inference from Hamdi's alleged statement was that he was not fighting for the Taliban when he was surrendered to the Northern Alliance forces. It does not indicate what the "if necessary" connotes. Does it mean in self defense or did a threatened force from the Taliban make it "necessary?"

Paragraph 6 of the Declaration states Hamdi was originally classified as an enemy combatant by "military forces" based upon his interviews and in light of his association with the Taliban. *Id.* at 2. The document is silent on whose military forces, i.e. U.S. military forces or Northern Alliance forces, who originally classified Hamdi as an enemy combatant. If it was Northern Alliance forces that originally classified him, then it is unclear how Northern Alliance forces differentiated themselves from Taliban forces during the conflict. Was there some garb of each that made identification easy to participants? Is any individual associated with or near the Taliban an "enemy combatant?"

[7] The regulation required such a team to determine the name, rank, date of birth, city and country of birth, name and address of next of kin, date of capture, place of capture, capturing unit, circumstances of capture, nation in whose armed services the individual is serving and much more information. Joint Services Regulation 1-7.

In paragraph 7, Mr. Mobbs states that Hamdi was determined to meet the "criteria" for enemy combatants by the U.S. military screening team at the Sheberghan prison. *Id.* There is no mention of the criteria used to make such a determination.

In paragraph 8, the declaration states that "a Detainee Review and Screening Team established by Commander, U.S. Central Command reviewed Hamdi's record and determined he met the criteria established by the Secretary of Defense for individuals over whom U.S. forces should take control and transfer to Guantanamo Bay." *Id.* It is unclear whether the Detainee Review and Screening Team's criteria at Kandahar was the same criteria used to make the determination regarding Hamdi's status as an enemy combatant at Sheberghan. It does not list the criteria used.

In paragraph 9, the declaration asserts that a "subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces which supports his classification as an enemy combatant." *Id.* at 2. Again, it appears that Mr. Mobbs is merely paraphrasing a statement supposedly made by Hamdi. Due to the ease with which such statements may be taken out of context, the Court is understandably suspicious of the Respondents' assertions regarding statements that Hamdi is alleged to have made. While it may be premature, and eventually unnecessary, for the Court to bring Hamdi before it to inquire about these statements, the Court finds that it must be provided with complete copies of any statements by Hamdi in order to appropriately conduct a judicial review of his classification. Petitioners' counsel asserted at the hearing that some of these statements were unclassified and provided by the

government to counsel for John Phillip Walker Lindh in a companion case in this district.

Without access to the screening criteria and Hamdi's statements, it is impossible to evaluate whether Mr. Mobbs is correct in his assertion that Hamdi's classification as an enemy combatant is justified. The Mobbs Declaration is little more than the government's "say-so" regarding the validity of Hamdi's classification as an enemy combatant. If the Court were to accept the Mobbs Declaration as sufficient justification for detaining Hamdi in the present circumstances, then it would in effect be abdicating any semblance of the most minimal level of judicial review. In effect, this Court would be acting as little more than a rubber-stamp. While the Respondents may very well be correct that Hamdi is appropriately classified as an enemy combatant, the Court is unwilling on the sparse facts before it to find so at this time. Obviously, the Respondents have the information as the United States military generally follows their own regulations.[8]

We must protect the freedoms of even those who hate us, and that we may find objectionable. If we fail in this task, we become victims of the precedents we create. We have prided ourselves on being a nation of laws applying equally to all and not a nation of men who have few or no standards. The warlords of Afghanistan may have been in the business of pillage and plunder. We cannot descend to their standards without debasing ourselves. We must preserve the rights afforded to us by our Constitution and laws for without it we return to the chaos of a rule of men

[8] Disobedience of regulations generally results in discipline actions.

and not of laws. Our Constitution was the first to develop a government of checks and balances. The legislative, executive, and judicial branches each check each other. While the Executive may very well be correct that Hamdi is an enemy combatant whose rights have not been violated, the Court is unwilling, on the sparse facts before it to find so at this time on the basis of the Mobbs Declaration. Therefore it is necessary to obtain the additional facts requested.

The Clerk of the Court is **DIRECTED** to transmit this Order via facsimile and U.S. mail to all counsel or [sic] record and to mail a copy to Yaser Esam Hamdi.

IT IS SO ORDERED.

/s/ Robert G. Doumar
UNITED STATES
DISTRICT JUDGE

Norfolk, Virginia

August 16, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, ESAM FOUAD HAMDI, as next friend of YASER ESAM HAMDI, Petitioners, v. DONALD H. RUMSFELD, Secretary of Defense, and COMMANDER W. R. PAULETTE, Norfolk Naval Brig, Norfolk, Virginia, Respondents.	)	CIVIL ACTION NO. 2:02cv439

TRANSCRIPT OF TELEPHONIC CONFERENCE

Norfolk, Virginia

August 20, 2002

Before: THE HONORABLE ROBERT G. DOUMAR
United States District Judge

[2] Appearances:

FEDERAL PUBLIC DEFENDER
By: LARRY M. SHELTON, ESQUIRE
Counsel for the Petitioners

DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
By: GREGORY GEORGE GARRE, ESQUIRE
and
UNITED STATES ATTORNEY'S OFFICE
By: LAWRENCE R. LEONARD, ESQUIRE
Counsel for the Respondents

[3] THE COURT: Identify yourself when speaking, please.

MR. SHELTON: Sir, this is Larry Shelton, Public Defender's Office. Your Honor, I'm calling to request the Court's permission to have until 10 o'clock tomorrow morning to respond to the respondents' motion for certification of interlocutory appeal and for stay.

THE COURT: All right. You oppose it?

MR. LEONARD: Judge, this is Larry Leonard. No, we don't oppose it, Your Honor, and we would like to ask the Court's consideration to delaying the production order for 24 hours to permit time for you to consider the motion.

THE COURT: Well, I don't mind delaying the production order until Monday under the circumstances.

MR. SHELTON: We have no objections, Your Honor, to a reasonable delay.

MR. LEONARD: Thank you, Your Honor.

THE COURT: All right. So we'll do that. But let's discuss the question of the certification, Mr. Leonard.

MR. LEONARD: Yes, sir.

THE COURT: What we'll do is I want it in at 12:00 noon. I'll grant you an extension until 12:00 noon Monday, to be delivered to the judge's chambers 12:00 noon Monday, okay?

MR. LEONARD: The judge's chambers, yes, sir.

THE COURT: And that's – what is Monday's date?

THE CLERK: The 26th.

[4] MR. LEONARD: The 26th.

THE COURT: August 26th, 2002.

MR. LEONARD: Yes, Sir.

THE COURT: 12:00 noon, judge's chambers, under seal.

MR. LEONARD: Yes, Sir.

THE COURT: All right. No copies are to be delivered to opposing counsel.

MR. LEONARD: Understood.

THE COURT: All right. Now, something perplexes me, Mr. Leonard. In the order I indicated that material that affected national security could be redacted. Did anybody read that?

MR. LEONARD: Yes, Your Honor.

THE COURT: Well, why are you saying it involves national security when –

MR. GARRE: Your Honor, this is Mr. Garre.

I think our point was that material requested, you know, even allowing for redaction, would account for virtually all the material the Court has requested, so that we appreciate Your Honor's efforts to take into account the national security sensitive nature of the information, but, even taking that into account, the way Your Honor – it has raised serious issues about what even could be provided to the Court.

THE COURT: Well, tell me, what is the issue? I'm confused now. What is the issue, Mr. Garre? I have a lot of [5] problems with the issue because what I was trying to do is proceed as cautiously as possible. Now, you're saying that it affects national security. How?

MR. GARRE: Well, I mean, certainly – and, you know, again this would be something we could get into, you know, in terms of an effort to comply to get to that point but certainly would involve, you know, substantially classified material, as well as material – and this is something we're evaluating – that would be –

THE COURT: Did I misunderstand?

MR. GARRE: – privileged.

THE COURT: My understanding was that evidently Mr. West was not telling Mr. Dunham the truth when he said the material that was given to him was not classified. Have you recently classified it?

MR. GARRE: Your Honor, with respect, I think the materials that Mr. Dunham was referring to are different and wouldn't be subject to materials I'm referring to. We're not talking about the same things. We're referring to statements or notes from intelligence gathering interviews and other materials, names and addresses of those engaged in interviews, including military personnel, primarily on the field in Afghanistan. I think we're referring to different things. Of course, a lot of it would refer to, you know, other stuff that the Court's order referred to, materials that were relevant, [6] legally relevant, to a determination of Hamdi's status. And, of course, that issue, we think, is tied up with some of the issues that were discussed at the hearing, and that were addressed in

the motion for dismissal, and that we think, you know, would be addressed –

THE COURT: Mr. Garre, you can cut it short. What you're saying is you-all feel that certain material, even though it's unclassified, and even though other people have seen it, cannot be seen by the undersigned or this judge; is that correct?

MR. GARRE: No, Your Honor, it's not.

THE COURT: Well, why wouldn't you disclose the information that you've disclosed to Mr. West, who was attorney for Mr. Lindh?

MR. GARRE: I think – and, again, I don't want to go through material that was the subject of the hearing, but I think a lot of this goes to what is legally relevant to a determination of Mr. Hamdi's status. And –

THE COURT: You know, Mr. –

MR. GARRE: Material that is the subject of the Court's production order if classified – we haven't maintained that every single piece is classified, but whether or not a single piece of material covered by the order would be classified, we think there is a threshold question of what material the Court would need to see to make an enemy – to [7] review the military's enemy combatant determination in this situation, and we think that those issues are addressed by the Court's recent order and would be appropriate for certification to the Court of Appeals so that we can – we understand Your Honor has made his ruling, but we think that guidance from the Court of Appeals on the appropriate standard here would be of assistance in going forward and determining what types of material would be legally relevant.

Again, I don't want to go on at undue length here, but I think Your Honor's order, initial order, would be materials relevant to Hamdi's legal status.

THE COURT: All right. Let me ask you a couple of questions, Mr. Garre, and this is this: Do you contend, therefore, that the Army regulations do not apply to people in the United States Army?

MR. GARRE: No, Your Honor.

THE COURT: All right. So the Army regulations would apply to any Army person, and the Navy regulations would apply to any Navy person; is that correct?

MR. GARRE: I haven't sat down to reread the regulations this morning, but certainly in the broad sense, yes, Your Honor. I mean, the regulations also have limitations on when and where they do apply, and I don't want to go back through material that was subject to the hearing, but we don't think they would apply in this case.

[8] THE COURT: So the Army regulations do not apply in a case of capturing someone on an enemy – who's on a battlefield or near a battlefield of someone who is opposing an ally of ours; is that correct? I assume the Northern Alliance is an ally of ours.

MR. GARRE: The Coalition forces we've been fighting with, yes, Your Honor. Again, the main point I wanted to stress at the hearing is that the regulations do define POWs covered by certain provision, and in our view that definition does not encompass Mr. Hamdi.

Again, to make another point that we –

THE COURT: Well, somebody in the Army had to decide it, didn't they?

MR. GARRE: Sure. And that, again, is something we think is covered by –

THE COURT: What the problem is is because they refer to the convening authority being required to establish a military tribunal, and convening authority means a general court-martial convening authority?

MR. GARRE: Once they made a determination as to the legal status, there is no need for that tribunal.

THE COURT: Who was the person who made the decision?

MR. GARRE: Well –

THE COURT: I mean, we're not entitled to know that, or was it Secretary – the respondent himself who made the [9] decision? Is he the person?

MR. GARRE: That Mr. Hamdi was an enemy combatant and should be detained is a decision that the Taliban and the al-Qaida are unlawful enemy combatants.

THE COURT: Would you explain to me what unlawful means?

MR. GARRE: Well –

THE COURT: Has he committed a crime? That's what unlawful is generally, correct?

MR. GARRE: Your Honor, I think the way it has been referred under the laws and customs of war, and I think the *Quirin* case again discusses that, is that unlawful refers to those who don't meet the criteria of –

THE COURT: They didn't say unlawful. They just said he was a belligerent; is that correct? They didn't say he was an unlawful, did they?

MR. GARRE: It goes to those who meet the criteria of the POW status in the Geneva Convention and under the laws and customs of war. Here the President has made the determination that the al-Qaida and the Taliban don't meet those criteria because, for example, they don't wear uniforms when they fight and they don't follow the laws of war because they attack civilians.

THE COURT: Well, I have some problems, starting with *McLaughlin*. Are you familiar with the *McLaughlin* case that [10] says any person who is being held for a criminal offense, that would be an unlawful offense, must have a preliminary hearing within 48 hours?

MR. GARRE: Your Honor, we've made clear Mr. Hamdi is not being held on any criminal charges, and we also made clear –

THE COURT: They didn't say he had charges. They said he had to have a preliminary hearing. You see, unlawful assumes he's done something against the law; is that correct?

MR. GARRE: Under the laws of war, Your Honor –

THE COURT: The laws of war?

MR. GARRE: The laws of war permit the capture and detention –

THE COURT: Who defines the laws of war? Does the Geneva Convention define the laws of war?

MR. GARRE: It may comprise a part of that, but I think it's a much broader –

THE COURT: Because obviously –

MR. GARRE: The *Quirin* case is the case the Court can look to to describe the particular laws and customs of war that would be applicable here. Again, I want to make the distinction between the determination that al-Qaida and Taliban detainees are unlawful combatants and the determination that was made with respect to Mr. Hamdi, that he should be detained as an enemy combatant. That determination is laid out in the [11] Mobbs' Declaration. And we appreciate that Your Honor has –

THE COURT: You know, the *Medley* case indicated that solitary confinement under the terms as set forth in the Colorado statute, which is exactly the same as these terms and conditions; that is, he can be visited by a chaplain or a minister – only it was a little broader. He could have a minister of his choice. But he could be seen by the custodian, but that's – they held that was punishment because it – in order to hold it was an *ex post facto* law they had to hold it was punishment. And that was in *Medley*. And then we come along with *Gideon* that says you're entitled to counsel. And then *Miranda*.

Obviously at some point they must have suspected him of something. You know, the whole thing is standing on its ear. But, however, Mr. Garre, it does appear that an appropriate solution would be to go ahead and appeal the case.

What do you think, Mr. Shelton? Because then you can go all the way to the Supreme Court. And once it's

certified and it's appealed, maybe you can finally get a hearing from either the Court of Appeals or the Supreme Court of the United States.

MR. SHELTON: Your Honor, we want to respond to their motion. We believe there are some things that the Court might want to consider prior to reaching that conclusion, so we certainly would like an opportunity to respond. The Court [12] could make its decision thereafter. And we intend to have that response filed by 10 o'clock tomorrow morning.

THE COURT: Can you have it filed by 10 o'clock tomorrow morning?

All right. You file it by 10 o'clock tomorrow morning. But here is the problem. I want to make a ruling by tomorrow afternoon. It appears, Mr. Shelton, that certainly the Fourth Circuit has a tremendous interest in this case. It is obvious to me that the respondents do not want to give the information. It also is apparent to me that the respondents are preparing to have what one would say is a standoff between the executive and judicial branches, and that it might be better to have the Court of Appeals go ahead and rule so that we can get out of the way any problems of having a clash between the judiciary and the executive. I am not interested in creating a clash.

MR. SHELTON: Your Honor, we aren't either.

THE COURT: But it's becoming obvious, Mr. Shelton, that whomever is running the case, whether it be the Justice Department or the Defense Department, whichever department is running the case – and I couldn't tell you who's running the case – they have made a decision to say we are just not going to do it, we want to hold

this man for as long as we want in solitary confinement, which seems to me to be the very antithesis of everything the Constitution stands for.

[13] MR. SHELTON: Your Honor, our position simply is if the government wants to stand on the Mobbs' Declaration – the Court has found that declaration to be inadequate – bring Mr. Hamdi before the Court. Get the answers from Mr. Hamdi.

THE COURT: Well, that may be a solution, but in the long run wouldn't it be better to have everything solved?

MR. SHELTON: The Fourth Circuit could not have the benefit of Hamdi's version of facts. We're still going to come back at some point to that determination. So if the government is not prepared to give me that information, we need to bring Mr. Hamdi before the Court.

THE COURT: What do you think about that, Mr. Garre?

MR. GARRE: Well, several things. First, obviously we would oppose that for, you know, many of the same reasons we would oppose sending a lawyer to Mr. Hamdi. And we've already addressed those at length. Secondly, I think that the posture the case is in now has clearly been the focus on the Mobbs' Declaration, which –

THE COURT: No. You have focused it on the Mobbs' Declaration, and the Court of Appeals has sort of agreed with you on that, so perhaps it better go back to the Court of Appeals so they can make a determination with regard to the Mobbs' Declaration.

MR. GARRE: Your Honor, that's certainly the approach that we've –

[14] THE COURT: You must have known that there were a lot of loss [sic] ends in the Mobbs' Declaration to start with. I haven't found out who Mobbs is yet. I don't know if he was just hired to make this declaration or not.

MR. GARRE: Your Honor, with respect, I think we addressed that at the hearing. That is covered by the declaration. We understand Your Honor has had questions about that, and –

THE COURT: I don't know who he is. My God, all you've got to do is say he's a special advisor? The whole thing is pretty loose, and, yet, there is no question in my mind that Mr. Hamdi has brought about some of his own problems since he did have a weapon it appears. Couldn't figure out who he was going to shoot with it because he kept it even after he supposedly surrendered. It strikes me as a little odd. It doesn't – it may not strike you as odd. I'd never heard of anything in any wars that I heard of before. Maybe – it just struck me as odd.

In any event, the whole thing strikes me as odd; however, I'm seriously thinking about going ahead and certifying it. But Mr. Shelton raises an interesting point, perhaps the solution is to release you from that requirement and just produce Hamdi according to the statute for writs of habeas corpus.

MR. GARRE: Your Honor, we would be happy to respond [15] to what Mr. Shelton filed, but obviously –

THE COURT: Well, you better respond right now because I'm going to make up my mind tomorrow. This thing has gone on and on, and I want to make up my

mind. If we certify it, we are causing Mr. Hamdi to be in confinement for a couple of more months in solitary. Perhaps something could be worked out where he wouldn't be placed in solitary and I wouldn't feel so – the way I feel. I feel solitary is a means of psychological punishment, if not real punishment. I tend to agree with the *Medley* case, which is a Supreme Court case, which says it is punishment.

The Fourth Circuit has held you could be there as long as six months as long as you had escape paraphernalia. I don't think anyone has suggested that he has escape paraphernalia, but I'm not sure what his sentence was. Was his sentence one year, two years, 10 years, life? We haven't found that out yet. The sentence is forever?

MR. GARRE: Let me respond to the points. First, we absolutely oppose the motion Mr. Hamdi should be brought into the courtroom. That would mean the most drastic approach.

THE COURT: It would mean no confrontation between the executive and the judiciary.

MR. GARRE: Obviously we would absolutely oppose that, and we would oppose it for the same reasons we opposed providing Mr. Shelton access to Hamdi. And, you know, we've [16] explained those reasons to the Court. I believe the Court –

THE COURT: The Fourth Circuit has ruled with you up to this point.

MR. GARRE: The letter –

THE COURT: You know something? It does not seem to me to be appropriate subsequent to a decision on the Mobbs' Declaration.

MR. GARRE: I would agree, Your Honor. I think it makes the most sense to certify the issue in the Mobbs' Declaration. As Your Honor noted, that's the issue the Court of Appeals mentioned in its most recent – issuing the mandate that was the subject of the hearing.

THE COURT: How can I submit a declaration from an individual whom I don't know has any connection with the United States of America? For all I know, he's a Saudi Arabian advisor.

MR. GARRE: Your Honor, I think that the declaration refutes that, that he's been substantially involved in the operation.

THE COURT: He says he is a person who's very familiar with this operation. I would assume the most familiar person would be someone who has knowledge of the area and the people in the area. And that would be somebody like perhaps somebody who has served over there in one capacity or another. I don't know. He may be with the Brookings Institute for all I [17] know.

MR. GARRE: Your Honor, that's not the case. It's obvious he's a special advisor to the Under Secretary of Defense.

THE COURT: Who is the Under Secretary of Defense? At least he's appointed by the President with the consent of the Senate; is he not?

MR. GARRE: Your Honor, no. The Under Secretary for Policy is. He works for that individual.

THE COURT: I'm not talking about Mobbs. I'm talking about the Under Secretary. Doesn't he have to have Senate consent?

MR. GARRE: Yes, Your Honor. Let me reassure you if the Fourth Circuit determines the legality of Mr. Hamdi's detention turns on whether or not Mr. Mobbs is an employee of the United States, there will be absolutely no issue about that.

THE COURT: What do you mean there is no issue? You mean you're going to present some evidence in the Fourth Circuit? I didn't know they took evidence up there. But I guess you could present anything you like. Maybe they'll give you a hearing.

MR. GARRE: But if –

THE COURT: And you can present Hamdi up there. You can, you know. They can issue a writ of habeas corpus out of [18] the Fourth Circuit. The Fourth Circuit has a right to do that in a habeas. I think that's one. You can apply to any court in the United States for a habeas. You can apply to any judge in the United States for a habeas for that matter.

So I understand your point, Mr. Garre. It just has me – it gives me some problems because if we start with *Medley* and we go to *Gideon* and then to *Miranda* and then to *McLaughlin* –

MR. GARRE: I hope Your Honor would read *Quirin* as well.

THE COURT: I read *Quirin*. *Quirin* was people who landed on the shores of the United States ready to blow up portions of this country. And I'm very familiar

with *Quirin*. And I know what they said. And this fellow is not even – we don't even know he was going to do anything other than he was receiving some training, according to Mobbs, whom we don't know knows anything. We do know that the circumstances of his capture, or whatever you call it, his taking, would have been written down, according to the Army regulations, giving the date of his capture, the circumstances of his capture, all of these materials that are absolutely required by Army regulations.

And I would presume, and assume, that any person, any officer of the United States, would follow the Army regulations; therefore, you have the information. And if Mobbs [19] had any grain of sense he would have known the date of capture because somebody would have taken it down. He would have known the circumstances of capture because somebody was required by the regulation to take it down. He would have known a lot of information which he has deliberately omitted from the declaration.

If you deliberately omit material, one has to assume that the material would be adverse to the party presenting it.

MR. GARRE: Your Honor, I would disagree with both the notion he's deliberately omitted things and that you could draw skepticism from that fact. The Mobbs' Declaration contains what we think are the grounds and circumstances resulting in his capture and detention, and it reviews the military's determination he is an enemy combatant.

THE COURT: I don't think – if you tried to present that before me in a case –

MR. GARRE: Mr. Mobbs –

THE COURT: – for summary judgment, I would throw you out on your ear; however, since it's the Secretary of Defense that's presenting it, I think it carries some weight because I am not interested in throwing the Secretary of Defense in jail; however, it may be better to certify it, get all of the answers, and then we will determine what happens.

MR. GARRE: Your Honor, in that vein, I mean, we would –

[20] THE COURT: Maybe the Supreme Court of the United States will follow your position. I have serious doubts that you'd ever be able to obtain such a ruling from the Supreme Court of the United States or, indeed, I don't think you're going to get such a favorable ruling from any Court of Appeals of the United States; however, I may still certify it, primarily to avoid a confrontation which has now become obvious.

But, Mr. Shelton, get me that memorandum in here by 10 o'clock tomorrow morning.

MR. SHELTON: Yes, sir.

THE COURT: I will extend the time. I'll get out an order, a short order, saying pursuant to the motion made today that – I will get out a short order saying that the time is extended until noon, August 26th, to produce the material and then determine – to give you an opportunity to file a memorandum. And then I will determine whether the matter should be certified.

Now, I'm not quite sure what matter is being certified. What matter do you want to certify exactly?

MR. GARRE: Your Honor, we laid it out in our motion. It would be the issues covered by Your Honor's August 16th order, which would include –

THE COURT: You want to say that the law issue is the sufficiency of the facts contained in the Mobbs' Declaration?

[21] MR. GARRE: That's right, Your Honor, and the validity of the scope and materials requested under the production order. We think that's the two issues.

THE COURT: Either you get one or the other. I'm not allowing any appeal from the production order because I haven't even entertained that. I'm going to issue a stay of that if I certify it. Now, what you want certified is the Mobbs' Declaration. The production order gets to be ridiculous because you're yelling it's national security, and it isn't even involved under any circumstances.

MR. GARRE: Well –

THE COURT: Look, Mr. Garre, it gets ridiculous. And it's insulting to me. And I'm sorry to say that a judge would have the gall to – what you're indicating is I would turn this over to some terrorist group. And that is insulting, believe me.

MR. GARRE: Your Honor –

THE COURT: Most insulting. And you tell the Secretary that I said so. And I'm instructing you to say so to him. And that's enough of that. However, I am seriously thinking about certifying the question of the Mobbs' Declaration. Don't get me into the other situation when you're yelling national security. I don't know who drew

that paper or who put that in there, but don't impugn my loyalty to this country.

[22] MR. LEONARD: Your Honor, this is Larry Leonard.

I can assure you that there was no intention on the respondents' part to do that at all. The question of the information did not have to do with any uncertainty on the part of the government that there would ever be such a writ, Your Honor. The focus of the issue is whether or not the Mobbs' Declaration stands alone and therefore it would require the production of additional information of this nature, certainly not that Your Honor might do something untoward with it or in any event question the integrity in the very least, Your Honor.

MR. GARRE: Your Honor, this is Mr. Garre.

I would echo Mr. Leonard's statements.

THE COURT: Well, you see, what bothered me, very frankly, is the fact that I said file it under seal in camera. I don't know how more secure I could make it other than that.

MR. LEONARD: Your Honor, I mean, we've fully noted – we fully intend to provide to the Court the classified document regarding the screening –

THE COURT: Don't provide me with anything. I made my decision on the Mobbs' Declaration. I've made my decision. Just provide what I asked for, but don't provide me anything after I've made my ruling.

MR. LEONARD: Very well.

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THE COURT: Just don't. I don't want something to clutter up the record. I asked for it. You're not giving me [23] anything else. You want to give me something that you think might be advantageous so you can present it to the Court of Appeals and then say, hey, look, this judge made a mistake? Look, I still probably will certify it unless Mr. Leonard can persuade me not to.

My inclination is I am not interested in getting into a situation where we clash with the executive department. And I'm certainly not interested in trying to hold the Secretary in contempt.

You'll file the material, Mr. Shelton, by 10 o'clock tomorrow morning.

Mr. Garre, the order is extended until the 26th at noon. I'll get out a short order on that based on the hearing today.

Is there anything else you want to take up?

MR. SHELTON: No, Your Honor. Nothing from the petitioners' standpoint.

MR. GARRE: Nothing from the respondents, Your Honor. Thank you very much for your time.

THE COURT: Good-bye.

(The proceedings were concluded.)

[24] CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Penny Commander Wile
Penny Commander Wile, RMR, CRR

August 20, 2002
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI, and
ESAM FOUAD HAMDI,
As Next Friend of
Yaser Esam Hamdi,

Petitioners,

v.

DONALD RUMSFELD, and
COMMANDER W.R. PAULETTE,

Respondents.

CIVIL ACTION
NO. 2:02cv439

CERTIFICATION ORDER AND STAY

(Filed Aug. 21, 2002)

This Court certifies the following question to the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b).

Certified Question: Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?

Certification of this question is appropriate because it involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from this Court's August 16, 2002, Order may materially advance the ultimate termination of this litigation.

The Court **STAYS** the deadline for compliance with its August 16, 2002, production Order until five (5) days after the Court of Appeals for the Fourth Circuit either declines jurisdiction over the appeal or issues a ruling on the certified question.

Procedural History

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia, Frank Dunham, filed a habeas corpus petition, naming as petitioners both Yaser Esam Hamdi and himself as Hamdi's next friend. After holding a hearing on May 29, 2002, this Court concluded that the habeas corpus petition was properly filed and ordered that Hamdi be allowed to meet with the Federal Public Defender on June 1, 2002. On May 31, 2002, the Respondents filed a motion in the Court of Appeals for the Fourth Circuit for a stay pending appeal of this Court's access order on the grounds that there was an insufficient relationship between Hamdi and the Federal Public Defender. The Court of Appeals granted the Respondents' Motion.

While the Federal Public Defender's petition was submitted to the appeals court, Esam Fouad Hamdi, the detainee's father, filed a separate petition for a writ of habeas corpus naming as petitioners both Yaser Esam Hamdi and himself as next friend. On June 11, 2002, this Court found that Hamdi's father had properly filed his habeas petition as next friend, appointed the Federal Public Defender as counsel for Petitioners, and ordered the Respondents to allow counsel access to Hamdi. The Respondents then filed a motion for stay in the Court of Appeals for the Fourth Circuit pending appeal of the June

11, 2002, Order. On June 14, 2002, the Court of Appeals granted the Respondents' Motion for a stay of this Court's June 11, 2002, Order and further ordered a stay of all proceedings before this Court in connection with Hamdi.

On June 26, 2002, the appellate court dismissed the petition brought by Frank Dunham finding an insufficient relationship between Mr. Dunham and the detainee. *Hamdi v. Rumsfeld*, No. 02-6827, slip op. at 2 (4th Cir. June 26, 2002). The appeals court further held that Hamdi's father had a sufficient relationship with Hamdi and had filed a valid next friend petition. *See id.* at 3 n.1.

On July 12, 2002, the Court of Appeals ruled on the Respondents' Appeal regarding this Court's June 11, 2002, access Order. *Hamdi v. Rumsfeld*, No. 02-6895, 2002 WL 1483908 (4th Cir. July 12, 2002). In their appeal, the Respondents argued that the habeas petition should be dismissed in its entirety, or alternatively, the case should be reversed and remanded to this Court for further proceedings. The appeals court declined to dismiss the petition, finding that such dismissal would be premature. *Id.* at *5. Instead, the Court of Appeals reversed this Court's June 11, 2002, Order and remanded the case for further proceedings. *Id.* at 2. In reversing, the appellate court held that this Court failed to extend to the political branches the appropriate deference in matters of foreign policy and national security. *Id.* at *3. The appellate court then directed this Court to consider "the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Id.* at *5-6.

On August 8, 2002, the Court of Appeals for the Fourth Circuit dissolved its stay order of June 14, 2002. In

doing so, the appeals court stated "that the district court may proceed in strict compliance with our July 12, 2002 decision." August 8, 2002, Order at 1. The Court of Appeals further directed this Court to "consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further." *Id.* at 2.

In response, this Court analyzed the Mobbs Declaration, considered briefs submitted from both the Respondents and the Federal Public Defender, and heard oral argument on August 13, 2002, from both sides. In strict compliance with the Court of Appeals August 8, 2002, Order, the sole purpose of the hearing was to determine whether the Mobbs Declaration, *standing alone*, was sufficient justification for a person born in the United States to be held without charges, incommunicado, in solitary confinement, and without access to counsel on U.S. soil.

On August 16, 2002, this Court held the Mobbs Declaration insufficient as a matter of law to justify Hamdi's classification as an enemy combatant. Instead of ordering the government to allow the Federal Public Defender access to Hamdi and in the interest of the least intrusive measures possible, the Court ordered the government to produce the documents previously requested in its July 31, 2002, Order.[1] The Court required the

[1] The 16 August, 2002, Order also required the Respondents to produce the screening criteria used to make the determination of Hamdi's status as an enemy combatant. The Respondents indicated in its Motion for Certification that it was now willing to turn the criteria over. Resp't Mot. for Certification of Interlocutory Appeal and for Stay, at 2 n.1.

production of the documents by August 21, 2002. To allay any concerns regarding national security implications of the requested documents, the Court ordered the sealed documents be produced ex parte and solely for in camera review.

On August 19, 2002, the Respondents filed a Motion for Certification of Interlocutory Appeal and for Stay. On August 20, 2002, the Court held a telephonic conference with lawyers for both sides to discuss the effect of the motion on the Court's production Order.[2] The Respondents requested an extension of time for compliance with this Court's August 16, 2002, production Order while the Court considered their latest motion. After considering the matter, the Court ordered Petitioners to file any response to Respondents' Motion by August 21, 2002, and granted the Respondents an extension of time on the production order until August 26, 2002.

Discussion

The Respondents' Motion for Certification of Interlocutory Appeal and for Stay requests that this Court certify the question of whether the Mobbs Declaration, *standing alone*, is sufficient to allow this Court to conduct a meaningful judicial review of Hamdi's classification status. Resp't Mot. for Certification of Interlocutory Appeal and for Stay, at 1 [hereinafter Resp't Mot.]. Under 28 U.S.C. § 1292(b), the Court has the discretion to certify such an appeal from an interlocutory order. Certification

[2] All telephonic conferences are with a clerk and a court reporter.

is proper if the following criteria are met: (1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion regarding the question; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

I. The August 16, 2002, Order Involves a Controlling Question of Law

The Respondents' assert that the Court's production Order involves a controlling question of law. As support for this proposition, the respondents' [sic] cite the recent Court of Appeals for the Fourth Circuit's statement that "[i]t has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." Resp't Mot., at 2-3 (quoting *Hamdi v. Rumsfeld*, No. 02-6895, 2002 WL 1483908 (4th Cir. July 12, 2002)). It is unclear what the Court of Appeals meant by this statement and this Court has several reservations regarding the implications of such a finding. First, the Executive's unilateral determination of Hamdi's status appears to violate the protections afforded by the international law of war as expressed in the Geneva Convention Relative to the Treatment of Prisoners of War, to which the United States is a signatory. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"). The GPW requires that any doubt regarding a person's status be determined "by a competent tribunal." *Id.* at Article 5. There is no evidence from the facts before the Court, limited as they are, that Hamdi's status was determined by a competent tribunal. The Court notes that the GPW

never mentions the term "enemy combatant." ABA Task Force on Treatment of Enemy Combatants, Preliminary Report, August 8, 2002, at 7-8 ("Until now, as used by the attorney general, the term "enemy combatant" appeared nowhere in U.S. criminal law, international law or in the law of war.") (internal citations omitted).

The second reservation that the Court has regarding the lawfulness of the Executive's unilateral determination of Hamdi's status is that it appears to violate the joint service regulations governing the detention of captured enemy combatants or others. *See* Joint Service Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Oct. 1, 1997) (hereinafter Joint Service Regulation). The Joint Service Regulation indicate [sic] that where a detainee's status is in doubt, a military tribunal, appointed by the general courts-martial convening authority, must determine whether the detainee is a prisoner of war. Joint Service Regulation 1-6(b) ("A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.") Here again, there is no evidence before the Court that Hamdi's status was determined by a military tribunal in accordance with the Joint Service Regulation.

In addition to the reservations listed above, the Court points out that any finding that the Executive can unilaterally classify a person born in the United States as an enemy combatant, justify the classification on naked

assertions such as those contained in the Mobbs Declaration, and thereby claim the authority to hold the detainee indefinitely, incommunicado, and in solitary confinement may have grave consequences for numerous Supreme Court precedents and their progeny. *See Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (holding that a judicial determination of probable cause is required within 48 hours of person being taken into custody); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *In re Medley*, 134 U.S. 160, 168-71 (1890) (holding that solitary confinement is a form of punishment).

Despite this Court's reservations regarding the lawfulness of the Executive's unilateral determination of Hamdi's status and his resulting indefinite detention, this Court declined to decide these issues in consideration of the Court of Appeals direction that this Court "consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further." August 8, 2002, Order at 2. As painstakingly set forth in this Court's August 16, 2002, Order, the Court found the Mobbs Declaration insufficient to allow the Court to conduct a meaningful judicial review of Hamdi's classification as an enemy combatant. Among the many shortcomings of the Mobbs Declaration highlighted by the Court, the Court found that the declaration failed to: (1) explain who Mr. Mobbs is and establish his authority to make or review Hamdi's classification as an enemy combatant; (2) establish that the government's classification of Hamdi's status was determined pursuant to appropriate authority to make such determinations; (3) establish that the screening criteria used to make and maintain Hamdi's classification met sufficient procedural requirements as to be consistent

with the Fifth Amendment's prohibition against governmental deprivation of life, liberty, or property without due process of law; and (4) explain the governmental determination that Hamdi's continuing detention without charges and without access to counsel serves national security. In light of these omissions, as well as the others set forth in the August 16, 2002, Order, this Court was forced to find the Mobbs Declaration insufficient as a matter of law.

While the Court feels that the Mobbs Declaration is clearly insufficient, *standing alone*, to justify Hamdi's classification, it recognizes that such a decision necessarily implicates the broader question of the degree of deference due to the Executive's determination. In earlier opinions, the Court of Appeals made it clear that the Executive is entitled to a great level of deference. But, the Appeals Court also declined to dismiss the petition, stating "[i]n dismissing . . . with no *meaningful judicial review*, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi*, 2002 WL 1483908, at *5 (4th Cir. July 12, 2002) (emphasis added). In its August 16, 2002, Order, this Court set forth the criteria it believes represent the balance between the appropriate level of deference to the Executive and the meaningful judicial review required under the circumstances. In applying these criteria to the Mobbs Declaration, the Court found the Declaration insufficient. However, given the Court of Appeals statement that if Hamdi is found to be an enemy combatant, then his detention is lawful, it appears that this Court's determination regarding the sufficiency of the Mobbs Declaration is a controlling question of law. If the Court held the Mobbs Declaration sufficient to classify Hamdi as an enemy combatant, then the Court of Appeals

has indicated that judicial review of his status is at an end.

II. Substantial Ground Exists for Difference of Opinion

Due to the implications regarding the criteria set forth by the Court to conduct[] its judicial review of Hamdi's classification, the Court acknowledges that substantial ground[s] exist[] for a difference of opinion regarding the sufficiency of the Mobbs Declaration. The Court believes that judicial deference to the Executive's authority cannot justify approving of Hamdi's classification as an enemy combatant based solely on the say-so of a "Special Adviser" to the Under Secretary of Defense for Policy. However, given the great deference that the Executive is entitled to in time of hostilities, the Court realizes that reasonable minds may differ in this opinion. This realization is enforced by the Court of Appeals for the Fourth Circuit's emphasis that "[o]ur Constitution's commitment of the conduct of war to the political branches of American government requires the Court's respect at every step." *Hamdi*, 2002 WL 1483908, at *3 (4th Cir. July 12, 2002).

III. An Immediate Appeal May Materially Advance the Ultimate Termination of the Litigation

If the Court of Appeals determines that this Court's finding regarding the sufficiency of the Mobbs Declaration is erroneous, then such a determination may advance the ultimate termination of the litigation. As previously noted, if the Mobbs Declaration is sufficient proof of Hamdi's status as an enemy combatant, then the Court of Appeals has indicated that further judicial review of his current

detention is foreclosed. Despite any reservations this Court may have about this proposition, this Court is bound to follow the dictates of the Court of Appeals for the Fourth Circuit. To fail to do so would stand over 200 years of American jurisprudence on its ear.

If the appellate court affirms this Court's holding that the Mobbs Declaration is insufficient, then this may also materially advance the ultimate termination of the litigation. It has become obvious that the Respondents appear to be prepared to defy this Court's production Order, and, thereby, create a confrontation between the executive and judicial branches of our government. While this Court would like to avoid any such confrontation, it will not abdicate its Constitutional responsibilities to do so. If the Court of Appeals affirms this Court's August 16, 2002, production Order, then this Court hopes that it will give the Respondents pause before embarking on a confrontation that would be harmful to both the Executive and the Judiciary.

The Clerk of the Court is **DIRECTED** to transmit this Order via facsimile and U.S. mail to all counsel or record and to mail a copy to Yaser Esam Hamdi.

IT IS SO ORDERED.

/s/ Robert G. Doumar
UNITED STATES
DISTRICT JUDGE

Norfolk, Virginia

August 21, 2002

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296 F.3d 278

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-6895

YASER ESAM HAMDI; ESAM
FOUAD HAMDI, as next friend
of Yaser Esam Hamdi,

Petitioners-Appellees,

versus

DONALD RUMSFELD;
W. R. PAULETTE, Commander,

Respondents-Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Robert G. Doumar, Senior District Judge. (CA-02-439-2)

Argued: June 25, 2002 Decided: July 12, 2002

Before WILKINSON, Chief Judge, and WILKINS and TRAXLER, Circuit Judges.

Reversed and remanded by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Wilkins and Judge Traxler joined.

ARGUED: Paul D. Clement, Deputy Solicitor General, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Geremy Charles Kamens, Assistant Federal Public Defender, Norfolk, Virginia, for Appellees. **ON BRIEF:** Paul J. McNulty, United States Attorney, Alice S. Fisher, Deputy Assistant Attorney General, Gregory G. Garre, Assistant to the Solicitor General, Lawrence R. Leonard, Managing Assistant United States Attorney, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Frank W. Dunham, Jr., Federal Public Defender, Robert J. Wagner, Assistant Federal Public Defender, Larry W. Shelton, Assistant Federal Public Defender, Norfolk, Virginia, for Appellees.

WILKINSON, Chief Judge:

Esam Fouad Hamdi has filed a petition for a writ of habeas corpus as next friend of his son, Yaser Esam Hamdi, a detainee at the Norfolk Naval Station Brig who was captured as an alleged enemy combatant during ongoing military operations in Afghanistan. In its order of June 11, 2002, the district court concluded that Hamdi's father properly filed his case as next friend, appointed the Federal Public Defender for the Eastern District of Virginia as counsel for the petitioners, and ordered the government to allow the Public Defender unmonitored access to Hamdi. Because the district court appointed counsel and ordered access to the detainee without adequately considering the implications of its actions and before allowing the United States even to respond, we reverse the court's June 11 order mandating access to

counsel and remand the case for proceedings consistent with this opinion.

I.

As recounted in the earlier appeal regarding Hamdi's detention, *Hamdi v. Rumsfeld*, No. 02-6827, the al Qaida terrorist network launched massive attacks on the United States on September 11, 2001, killing approximately 3,000 people. In the wake of this tragedy, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The President responded by ordering United States armed forces to Afghanistan to subdue al Qaida and the governing Taliban regime that was supporting it. During this ongoing military operation, thousands of alleged enemy combatants have been captured by American and allied forces including, as the government contends, Hamdi.

Hamdi was initially transferred to Camp X-Ray at the Naval Base in Guantanamo Bay, Cuba. After it came to light that he was born in Louisiana and may not have renounced his American citizenship, Hamdi was brought to the Norfolk Naval Station Brig. His petition claims he was taken into custody in Afghanistan in the fall of 2001, transferred to Guantanamo Bay in January 2002, and transferred again to Norfolk in April 2002. Believing that Hamdi's detention is necessary for intelligence gathering efforts, the United States has determined that Hamdi

should continue to be detained as an enemy combatant in accordance with the laws and customs of war.

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia, Frank Dunham, filed a habeas petition, naming as petitioners both Hamdi and himself as Hamdi's next friend. The Public Defender had been in contact with Hamdi's father, but the father had not sought to be appointed as next friend as of the time the Defender filed his petition. Subsequently, one Christian Peregrim, a private citizen from New Jersey, filed a separate habeas petition on Hamdi's behalf, naming the United States Navy as respondent. On May 29, the district court held a hearing, consolidated the Public Defender's petition with Peregrim's, and concluded that the Defender's case was "properly filed by Frank Dunham as next friend."

After directing the government to respond by June 13, the district court ordered that "Hamdi must be allowed to meet with his attorney because of fundamental justice provided under the Constitution." Further, the court ordered that the meeting be unmonitored and be allowed to take place as of June 1, twelve days before the government's answer was due.

On May 31, the United States filed a motion for stay pending appeal of the district court's access order. We stayed the court's order and heard oral argument four days later.

While these cases were under submission, Hamdi's father filed a separate petition for a writ of habeas corpus under 28 U.S.C. §§ 2241 & 2242, naming as petitioners both Hamdi and himself as next friend. This petition is presently before us. The father's petition asked, *inter alia*,

that the district court: (1) "Grant Petitioner Esam Fouad Hamdi Next Friend status, as Next Friend of Yaser Esam Hamdi;" (2) "Appoint counsel to represent Yaser Esam Hamdi because he is indigent and has no funds with which to retain counsel in the United States;" (3) "Order Respondents to cease all interrogations of Yaser Esam Hamdi, direct or indirect, while this litigation is pending;" and (4) "Order that Petitioner Yaser Esam Hamdi be released from Respondents' unlawful custody." Unlike the Public Defender's petition, the father's petition did not specifically request that counsel be granted unmonitored access to Hamdi.

On June 11, before the government had been served with the father's petition, the district court determined that Hamdi's father could proceed as next friend. The court then ordered the government to answer by noon on June 17, and appointed the Public Defender as counsel for the detainee based on the father's affidavit stating that neither he nor his son was able to pay for an attorney. *See* 18 U.S.C. § 3006A. Further, the court again ordered the government to allow the Defender unmonitored access to Hamdi "for the same reasons articulated in the May 29, 2002 Order." The court specified that this meeting was to be "private between Hamdi, the attorney, and the interpreter, without military personnel present, and without any listening or recording devices of any kind being employed in any way." And the court ordered that the meeting be allowed to take place by June 14, three days before the government's response was due. Finally, the court stayed its order to allow the government an opportunity to appeal.

On June 13, the United States filed a second motion for stay pending appeal. The following day, we stayed both

the district court's June 11 order and all proceedings before that court regarding the detainee. We heard oral argument on the instant appeal on June 25.

We subsequently dismissed the habeas petitions filed by the Public Defender and Peregrim as Hamdi's next friend. Neither had a significant relationship with the detainee, *Hamdi v. Rumsfeld*, No. 02-6827, slip op. at 2 (4th Cir. June 26, 2002), and Hamdi's father plainly had a significant relationship with his son and had filed a valid next friend petition. *See id.* at 3 n.1. We therefore turn to the district court's June 11 order.[1]

II.

The order arises in the context of foreign relations and national security, where a court's deference to the political branches of our national government is considerable. It is the President who wields "delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). And where as here the President does act with statutory authorization from Congress, there is all the more reason for deference. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 & n.2 (1952) (Jackson, J., concurring). Indeed, Articles I and II prominently assign to Congress and the President the shared

[1] For the same reasons stated in our previous opinion, *see Hamdi*, No. 02-6827, slip op. at 5 n.2, we are presented here with an appealable order.

responsibility for military affairs. *See* U.S. Const. art. I, § 8; art. II, § 2. In accordance with this constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 660-61 (1981); *Curtiss-Wright*, 299 U.S. at 319-20; *United States v. The Three Friends*, 166 U.S. 1, 63 (1897); *Stewart v. Kahn*, 78 U.S. 493, 506 (1870); *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862).

This deference extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle. The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2. As far back as the Civil War, the Supreme Court deferred to the President's determination that those in rebellion had the status of belligerents. *See The Prize Cases*, 67 U.S. (2 Black) at 670. And in World War II, the Court stated in no uncertain terms that the President's wartime detention decisions are to be accorded great deference from the courts. *Ex parte Quirin*, 317 U.S. 1, 25 (1942). It was inattention to these cardinal principles of constitutional text and practice that led to the errors below.

III.

The district court's June 11 order directed the United States to provide the Public Defender unmonitored access to Hamdi. And petitioners contend that order represented an unexceptional exercise of a district court's discretion in a case challenging the legality of an American citizen's

restraint. Petitioners' characterization, however, is incomplete. The court's order was not merely a garden-variety appointment of counsel in an ordinary criminal case. If it had been, the lower court's discretion would be almost plenary and hardly a subject for appeal, much less reversal. *See* 18 U.S.C. § 3006A. But the June 11 order was different in kind. In the face of ongoing hostilities, the district court issued an order that failed to address the many serious questions raised by Hamdi's case.

For example, it has been the government's contention that Hamdi is an "enemy combatant" and as such "may be detained at least for the duration of the hostilities." The government has asserted that "enemy combatants who are captured and detained on the battlefield in a foreign land" have "no general right under the laws and customs of war, or the Constitution . . . to meet with counsel concerning their detention, much less to meet with counsel in private, without military authorities present." The Public Defender for his part has contended that "no evidence has been submitted to support" Hamdi's status as an enemy combatant and that "unlike aliens located outside the United States, Petitioner Hamdi [as an American citizen detained in the United States] is entitled to constitutional protections" including unmonitored access to counsel.

The district court's June 11 order purported to resolve these and many other questions without proper benefit of briefing and argument. Indeed the court directed that counsel have unmonitored access to Hamdi three days before the government's response was even due. There is little indication in the order (or elsewhere in the record for that matter) that the court gave proper weight to national security concerns. The peremptory nature of the proceedings stands in contrast to the significance of the issues

before the court. The June 11 order does not consider what effect petitioner's unmonitored access to counsel might have upon the government's ongoing gathering of intelligence. The order does not ask to what extent federal courts are permitted to review military judgments of combatant status. Indeed, the order does not mention the term enemy combatant at all.

Instead, the June 11 order apparently assumes (1) that Hamdi is not an enemy combatant or (2) even if he might be such a person, he is nonetheless entitled not only to counsel but to immediate and unmonitored access thereto. Either ruling has sweeping implications for the posture of the judicial branch during a time of international conflict, and neither may rest on a procedurally flawed foundation that denied both petitioners and the government a chance to properly present their arguments, or to lay even a modest foundation for meaningful appellate review. The district court's order must be reversed and remanded for further proceedings.

IV.

A.

The government urges us not only to reverse and remand the June 11 order, but in the alternative to reach further and dismiss the instant petition in its entirety. In its brief before this court, the government asserts that "given the constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such." The government thus submits that we may not review at all its designation of an American citizen as an enemy combatant

– that its determinations on this score are the first and final word.

Any dismissal of the petition at this point would be as premature as the district court's June 11 order. In dismissing, we ourselves would be summarily embracing a sweeping proposition – namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so. Given the interlocutory nature of this appeal, a remand rather than an outright dismissal is appropriate.

If dismissal is thus not appropriate, deference to the political branches certainly is. It should be clear that circumspection is required if the judiciary is to maintain its proper posture of restraint. *The Prize Cases*, 67 U.S. at 670 ("[T]his Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted."). The federal courts have many strengths, but the conduct of combat operations has been left to others. *See, e.g., Quirin*, 317 U.S. at 25-26. The executive is best prepared to exercise the military judgment attending the capture of alleged combatants. The political branches are best positioned to comprehend this global war in its full context and it is the President who has been charged to use force against those "nations, organizations, or persons *he determines*" were responsible for the September 11 terrorist attacks. Authorization for Use of Military Force, 115 Stat. at 224 (emphasis added). The unconventional aspects of the present struggle do not make its stakes any less grave. Accordingly, any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect a recognition that government has no more profound responsibility than the

protection of Americans, both military and civilian, against additional unprovoked attack.

B.

The standards and procedures that should govern this case on remand are not for us to resolve in the first instance. It has long been established that if Hamdi is indeed an "enemy combatant" who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one. *See, e.g., Quirin*, 317 U.S. at 31, 37 (holding that both lawful and unlawful combatants, regardless of citizenship, "are subject to capture and detention as prisoners of war by opposing military forces"); *Duncan v. Kahanamoku*, 327 U.S. 304, 313-14 (1946) (same); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (same). Separation of powers principles must, moreover, shape the standard for reviewing the government's designation of Hamdi as an enemy combatant. Any standard of inquiry must not present a risk of saddling military decision-making with the panoply of encumbrances associated with civil litigation.

As for procedures, we cannot blueprint them on this appeal. The government has sought to file as an *ex parte*, supplemental attachment to its brief before this court "a sealed declaration discussing the military's determination to detain petitioner Hamdi as an enemy combatant." The government explains that "[t]his declaration is not a matter of record, as it was not proffered in the district court because the proceedings there did not reach the point where the merits of the habeas petition were reached." The government further states that the declaration "specifically delineates the manner in which the

military assesses and screens enemy combatants to determine who among them should be brought under Department of Defense control," and "describes how the military determined that petitioner Hamdi fit the eligibility requirements applied to enemy combatants for detention." This declaration is factual in nature. As such, it should come first before the district court, not the court of appeals.

The development of facts may pose special hazards of judicial involvement in military decision-making that argument of questions of pure law may not. For example, allowing alleged combatants to call American commanders to account in federal courtrooms would stand the warmaking powers of Articles I and II on their heads. Finally, the role that counsel should or should not play in resolving questions of law or fact is a matter of immense importance.[2]

V.

Upon remand, the district court must consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary. Our Constitution's commitment of the conduct of war to the political branches of American government requires the court's respect at every step. Because the district court appointed counsel and ordered access to the detainee without adequately considering the implications of its

[2] Whether the financial eligibility requirements of 18 U.S.C. § 3006A have been satisfied is likewise an issue we leave for remand.

actions and before allowing the United States even to respond, we reverse the court's June 11 order mandating access to counsel and remand the case for proceedings consistent with this opinion.

REVERSED AND REMANDED.

(SEAL)

U.S. Department of Justice

Office of the Solicitor General

Principal Deputy Solicitor General

Washington, D.C. 20530
August 2, 2002

VIA FACSIMILE

Ms. Patricia S. Connor
Clerk
United States Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

Re: Rumsfeld v. Hamdi, No. 02-6895

Dear Ms. Connor:

In connection with Respondents' Emergency Motion for Stay Pending Appeal, filed June 13, 2002, in the above captioned appeal, Respondents submitted the declaration of Colonel Donald D. Woolfolk (a copy of which is attached hereto). In that declaration, Colonel Woolfolk explained the vital role that interrogations of enemy combatants such as Yaser Esam Hamdi play in ensuring the security of this Nation and its citizens, and that Hamdi's background suggested "considerable knowledge of Taliban and al Qaida training and operations" that could make Hamdi "have future value as a source of intelligence." Woolfolk Decl. at 2. Colonel Woolfolk also indicated that, at the time of his declaration, the Department of Defense had "voluntarily chosen to suspend active interrogations of [Hamdi] pending resolution of legal matters." *Ibid.*

I am writing to inform the Court that the Department of Defense has informed me that, in light of a recent change in circumstances, it has determined to resume interrogations of Hamdi for intelligence purposes. The Department of Defense has also informed me that, in its judgment, these interrogations, which resumed today, are compelled by important national security concerns. Should the Court deem it necessary, Respondents can provide a declaration ex parte and under seal concerning these changed circumstances. However, because the interviews are being conducted solely for intelligence purposes, and are unavailable to counsel for the Respondents, information concerning the interviews themselves could not be included in such a filing. Although we do not believe that this development affects the opinion issued by this Court, we wish to inform the Court so that the record may be clear on this point.

Accordingly, we request that this letter be distributed to the panel in the above-referenced case as soon as possible. Thank you for your assistance in this matter.

Very truly yours,

/s/ Paul D. Clement
Paul D. Clement
Principal Deputy
Solicitor General

Enclosure

cc: Hon. Robert G. Doumar
Frank W. Dunham, Jr.

ATTACHMENT C

FOR OFFICIAL USE ONLY

Declaration of DONALD D. WOOLFOLK

Pursuant to 28 U.S.C. 1746, I, Donald D. Woolfolk, hereby state that, to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

(FOUO) I am a Colonel in the US Army with 30 years Active Federal Commissioned Service. I currently am the Deputy Commander, Joint Task Force (JTF) 170, Guantanamo Bay, Cuba, however, I am serving today as the Acting Commander. As such, I am directly responsible for the successful execution of the JTF 170 mission to fully exploit the intelligence value of terrorist personnel, Taliban, and al Qaida personnel detained worldwide. Currently, there are in excess of 450 detainees being held at the detainee camp at Guantanamo Bay, Cuba.

(U) The security of this nation and its citizens is wholly dependent upon the U.S. Government's ability to gather, analyze, and disseminate timely and effective intelligence. Put simply, intelligence saves lives. Nowhere has this proposition become more apparent than in our nation's current War on Terrorism. Absent a total commitment to intelligence gathering efforts, incidents like those that occurred on September 11th could become tragically common.

(U) The Department of Defense has expended considerable effort to develop effective intelligence techniques, particularly during Operation Enduring Freedom. The Department of Defense employs numerous means and methods to learn information from various sources that may assist everyone from the commanders in the field in Afghanistan

to the police chiefs in small towns throughout the United States. A critical element of the intelligence process is that it must be continuous. The timely, effective use of intelligence provides this nation with the best chance of both achieving unqualified success in combating terrorism abroad and maintaining domestic tranquility at home.

(FOUO) A fundamental tool used in the gathering of intelligence is interrogation. This method of active intelligence gathering permits collection of information from sources with direct knowledge of, among other things, plans, locations and persons seeking to do harm to the United States and our citizens. When done effectively, interrogation provides information that likely could not be gleaned from any other source. Loss of this tool, in any respect, would undermine our nation's intelligence gathering efforts, thus crippling the national security of the United States. The United States does not employ any corporal means of coercion to gain information from persons being interrogated. Rather, the United States has adopted a humane approach to interrogation that relies upon creating an atmosphere of dependency and trust between detainees and the intelligence gathering staff assigned to that detainee. Over time, information is learned. The United States is now engaged in a robust program of interrogating individuals who have been identified as enemy combatants in the global War on Terrorism. This is because it is recognized that they unquestionably hold critical information that is crucial to our national security. A prime example of the effectiveness of this method of interrogation through dependency and trust can be found in the announcement this week of the U.S. Government's disruption and detention of a U.S. citizen working in coordination with al Qaida to detonate a

"dirty bomb" in the United States. Knowledge and disruption of this plot may not have occurred absent effective intelligence gathered through interrogation.

(FOUO) Interrogation leading to the development of meaningful and usable intelligence is not static. The collection of intelligence is active and ongoing. As new intelligence information is derived from any source, the opportunity to learn additional information through interrogation is presented. We are now living in an age where our nation is engaged in international armed conflict against terrorism. Unlike any previous conflict, we face a foe that knows no borders and perceives all Americans, wherever they may be, as targets of opportunity. Under such circumstances the need to maintain the tightly controlled environment, which has been established to create dependency and trust by the detainee with his interrogator, is of paramount importance. Disruption of the interrogation environment, such as through access to a detainee by counsel, undermines this interrogation dynamic. Should this occur, a critical resource may be lost, resulting in a direct threat to national security.

(FOUO) It has been brought to my attention that efforts are underway to provide detainee Yaser Esam Hamdi, an enemy combatant currently being detained in the Naval brig in Norfolk, Virginia, with access to counsel. Permitting such access to detainee Hamdi may create substantial harm to U.S. national security interests. Most importantly, the disruption occasioned by the insertion of outside counsel will sever the intelligence gathering value of this detainee. As stated previously, the intelligence gathering process must be continuous. As new information is learned from other sources it serves as a new avenue of interrogation with detained enemy combatants.

(FOUO) Detainee Hamdi's background and experience, particularly in the Middle East, Afghanistan, and Pakistan, suggest considerable knowledge of Taliban and al Qaida training and operations. While we have voluntarily chosen to suspend active interrogations of this detainee pending resolution of legal matters, he could have future value as a source of intelligence. Granting access by counsel under these circumstances will not only disrupt the secure interrogation environment that the United States has labored to create, it will thwart any opportunity to develop intelligence through this detainee.

(FOUO) Further, providing counsel access to detainee Hamdi may have unintended consequences in a number of other ways. For instance, al Qaida training literature and intelligence gathering efforts have revealed that members have been trained in means of covert communication during periods of capture. As such, counsel could unwittingly provide information to the detainee, or be used by the detainee as a communication tool. This may open an information conduit between detainee Hamdi and members of al Qaida, the Taliban, or other terrorist groups against whom the United States is actively engaged in combat. Also, detainee Hamdi is the only detainee that has been under U.S. control in Afghanistan, Guantanamo Bay and Norfolk. Harmful information could be intentionally or unintentionally passed on concerning these facilities, thus increasing the threat to US forces and facilities in those areas. Finally, information from, or concerning, detainee Hamdi could be brought to the attention of terrorists who later themselves become detainees in Guantanamo Bay. Armed with any such knowledge, such "new" detainees may be able to poison the interrogation environment currently being maintained in Guantanamo

Bay by information derived as a result of counsel access to Hamdi.

/s/ Donald D. Woolfolk
Signature of Declarant

Executed on 13 June 2002

UNITED STATES COURT OF APPEALS

FOR THE FOURTH COURT

No. 02-6895
(CA-02-439-2)

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,

Petitioners-Appellees,

versus

DONALD RUMSFELD; W.R. PAULETTE, Commander,

Respondents-Appellants.

ORDER

(Filed Aug. 8, 2002)

Appellees have filed a motion to dissolve this Court's stay order of June 14, 2002. Appellants have filed a response in opposition.

The mandate in *Hamdi v. Rumsfeld*, No. 02-6895, shall issue forthwith and the stay is dissolved in order that the district court may proceed in strict compliance with our July 12, 2002 decision. In that decision, we directed the court to consider "the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Hamdi v. Rumsfeld*, 2002 WL 1483908 (4th Cir. July 12, 2002).

In accordance with the principles set forth in that opinion, the district court shall consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further.

Entered at the direction of Chief Judge Wilkinson, with the concurrence of Judge Wilkins and Judge Traxler.

For the Court

/s/ Patricia S. Connor
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
RICHMOND, VIRGINIA

Yaser Esam Hamdi

v. CASE NO: 02-7338

Donald Rumsfeld

Transcript in the above-styled matter when heard before the United States Court of Appeals for the Fourth Circuit, on Monday, October 28th, 2002.

[2] APPEARANCES:

Paul Clement
Deputy Solicitor General
Washington, D.C.

Frank W. Dunham, Jr.
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Alexandria, Virginia

[1] THE CLERK Oyez, Oyez, Oyez, the United States Court of Appeals for the Fourth Circuit is now sitting to hear argument in the Hamdi versus Rumsfeld, 02-7338, before Chief Judge J. Harvey Wilkinson, III; Judge William W. Wilkins, Jr. and Judge William P. Traxler, Jr. Arguing on behalf of the Appellant is Mr. Clement, Deputy Solicitor General. Arguing on behalf of the Appellee is Frank W. Dunham, Jr., Assistant Federal Public Defender for the Eastern District of Virginia.

JUDGE WILKINS Good afternoon, we're here to hear argument in Hamdi vs. Rumsfeld.

MR. CLEMENT Good afternoon, Chief Judge Wilkinson and Your Honors, and may it please Judge

Wilkins. It has been a little over four months since this court last heard argument in the Hamdi case but the essentials in the case remain the same. The major difference is since the last time this court heard this case there has been substantial development of the record below and in particular the respondents have filed a Motion to Dismiss the petition with an accompanying declaration that provides a fuller factual backdrop of the case and helps develop the legal issues before Judge Wilkins. Now, the District Court saw that declaration and found it inadequate and by implication found the respondents Motion to Dismiss inadequate and he did that despite recognizing that he quote had no doubts that Hamdi [2] went to Afghanistan to be with the Taliban, and that he had a weapon and that he was there to fight. Now, those factors should of been enough to convince the District Court that Hamdi is a prototypical enemy combatant. But instead the District Court found the declaration inadequate and ordered an unprecedented production order that required the government to produce everything from the law notes of intelligence interviews to the names and addresses of all the individuals who talked to Mr. Hamdi. Now, with respect I think the District Court could only have simultaneously recognized that Hamdi was in Afghanistan to be with the Taliban, that he had a firearm and that he was there to fight and reject the governments Motion to Dismiss by ignoring this courts instruction in the earlier appeal that the District Court and Judge Wilkins generally owe deference in this area to the military's determinations.

JUDGE WILKINS One of the things that concerns the District Court was the indefinite nature of

the detention and Hamdi is to be detained for the duration of hostilities. One thing I wanted to ask you, is what hostilities do you understand to be talking about? Are we talking about the hostilities in Afghanistan or are we talking about hostilities these are the al-Qaida, or are we talking about hostilities in a broader sense in a sense in the war on terrorism? Which hostilities have to end in order for this confinement to come to [3] an end, which set of hostilities are the relevant ones?

MR. CLEMENT Well, Your Honor, I think that the relevant hostilities are broader than just the ongoing hostilities that are taking place in Afghanistan and I think the starting point would be to take a look at the joint resolution that Congress passed. Because they recognized that the authorization for force and support of the President's inherent authority as Commander in Chief was to deal with the al-Qaida and those responsible for the attacks of September 11th.

JUDGE WILKINS You're talking about a broader set of hostilities than specifically those in Afghanistan. What other parameters of hostilities, which hostilities are we talking about, hostilities against whom?

MR. CLEMENT Well, I think we're talking about hostilities against those responsible for the attacks of September 11th and those who supported them. And I think that the focus is on al-Qaida but also in regimes like the Taliban that supported the al-Qaida and I think what you would –

JUDGE WILKINS Would you give us a sense or any benchmark as to when the executive was determined that those hostilities had concluded, or are we

talking about months or years, or how far into the future?

MR. CLEMENT Well, I think we're talking about certainly at least months and probably some [4] years, but I think in answering the question I think it's important to recognize that there may be a difference with respect to certain detainees. Because if you talk about somebody who's being detained as a core member of the al-Qaida, the cessation of hostilities in Afghanistan may be of little relevance to that persons continuing threat. But if you talked about somebody who has been involved with the Taliban but perhaps not the al-Qaida then it may be the cessation of hostilities in Afghanistan is a more important benchmark and it may be that they –

JUDGE WILKINS Which do you consider Hamdi to be?

MR. CLEMENT Well, certainly the supporting declaration makes clear that Hamdi went to Afghanistan to be with the Taliban and there's no suggestion in the declaration that he's affiliated with the al-Qaida.

JUDGE WILKINS If Hamdi went to Afghanistan to be with the Taliban, would the relevant conclusion of hostilities be the end of the hostilities in Afghanistan? I understand you think that they're not concluded yet, you indicated that American forces had been under fire and are still searching the Eastern mountain passes for evidence of terrorist tracks. But the, if Hamdi's affiliation with the Taliban is what we're concerned about here, the hostilities would be those in Afghanistan.

[5] MR. CLEMENT Again, I think they may be the relative benchmark for Hamdi and I think ultimately though there's going to be an executive determination and I don't want to foreclose the possibility that the executive based on interrogations or interviews with Hamdi determines that he actually poses a broader threat that goes beyond Afghanistan. But if we put that possibility to one side –

JUDGE WILKINS Does it – justiciable issues?

MR. CLEMENT Well, I don't think that the end of hostilities is a justiciable issue and I think the Supreme Court recognized that Ludeci case and I think when hostilities end is a classic political question. I think, if I could suggest Chief Judge Wilkinson what you might have if there was in fact an executive declaration that hostilities in Afghanistan had ceased and then the government continued to hold somebody like Hamdi past that point, at that point that might be a basis for another petition for habeas corpus and at that point the government may have to come forward with again, some evidence as to why it's continuing to detain him. But I think, again I don't want to foreclose the possibility that somebody like Hamdi might need to be detained after the hostilities are closed in a particular front on this ongoing war.

JUDGE WILKINS In terms of illegal detention I realize it takes a great deal of time to gather [6] intelligence and that as one gathers it from many sources. Is Mr. Hamdi still of use in your intelligence gathering activities or is this somebody who is being held just to create precedent. Is Hamdi still in accordance, it's been six months now since he was brought to

Norfolk and was detained or just shortly after Americans – is he still of importance to you in your intelligence operation?

MR. CLEMENT He is Your Honor, and I think there are two things that are worth keeping in mind with respect to that fact. One is that it's not just a matter in dealing with it with a situation that's fluid as the ongoing efforts to deal with al-Qaida as simply interviewing somebody, getting them all the information they have and then you're done with that person, because what has happened is that on a world-wide basis the United States and it's allies have come into contact with additional al-Qaida operatives, and every time the United States comes in contact or its allies come in contact with an additional operative who may have new information, then there's an opportunity to take that information and ask new lines of questioning of detainees in it's prevent ongoing process.

The other thing that I think is important to keep in mind that without sort of speaking specifically to Mr. Hamdi's situation in dealing with the al-Qaida and the Taliban, these are not individuals who are anxious to cooperate in the first [7] instance, but their willingness to cooperate may increase over time. So for both of those reasons I think that Mr. Hamdi in particular and many of the detainees in general are of continuing intelligence value. As you may have read in the papers it's also true that the United States has released a few individuals who were previously being held in Guantanimo [sic], because of a variety of factors including that those individuals no longer had intelligence value to the United States.

JUDGE WILKINS The decision to detain would rest on the designation of Mr. Hamdi is an enemy combatant. Mr. Mobbs is the one that's made that declaration and I see he's a special advisor to the Under Secretary of Defense. The policy, I don't know him I'm, I understand he's a fine gentleman I'm sure. Whenever you have visibility and accountability to the process and you have Presidential appointees who have confirmation designations. Mr. Mobbs is buried somewhat deeply in the bureaucracy. I'm just wondering in terms of the visibility and accountability of an enemy combatant process. Would it add to the visibility and accountability to have an Assistant Secretary or Under Secretary of Defense who was confirmed by the Senate make these designations? I'm just curious how you settled upon an official to make a designation with consequences which are to be serious for an American citizen?

MR. CLEMENT Let me take that in [8] a couple of parts Your Honor, first of all I certainly wouldn't want to denigrate Mr. Mobbs position because he is a special advisor to the Under Secretary of Defense and that is a very responsible and important position. But let me also say that I want to correct any misimpression that it's not really Mr. Mobbs himself who's making this determination, Mr. Mobbs was effectively summarizing the process that the administration or the military made in treating Mr. Hamdi as an enemy combatant. And I think there really were four separate stages at which a determination was made that Hamdi was an enemy combatant. The first of course was made by our allies the Northern Alliance when they originally seized him armed with a firearm. A second determination was made –

JUDGE WILKINS How do we know that?

MR. CLEMENT We know that, well for purposes of the record in this case we of course know that from the Mobbs Declaration. The Mobbs Declaration itself relays that information and presumably incorporates information from the Northern Alliance. I also don't, and I think that as Mobbs Declaration notes in Paragraph 9 of the declaration, those facts were also confirmed by Hamdi himself in interviews with the government.

JUDGE WILKINS Is it fair to characterize the Mobbs Declaration as a form of double hearsay [9] and the information was gathered from the Northern Alliance commanders in Kandahar and Mozar Sharif and respond to presumably the Americans said that he was turned over in Kandahar and then from there it's relayed to the Department of Defense officials in Washington? Are we dealing in essence with a form of double or triple hearsay here and if so why should we trust him?

MR. CLEMENT Well, Your Honor, let me say this first and I don't want to get into the details whether it's a double or triple hearsay, but I think we would can see that it is hearsay and I think the reason that you should credit it is that it is a sworn affidavit and a sworn declaration. And the point of the declaration is to provide Judge Wilkins with an overview of the decision-making process that the executive branch made in this case. And I think, as I was saying there really were four determinations here, the first made by our allies, the second made by U.S. ground forces on the ground in Shida Prison, the third determination made in Kandahar again by U.S. forces and then a subsequent determination made on the basis that these interviews with Hamdi only confirmed his status as

an enemy combatant. And I think that it's important to recognize that when you're talking about –

JUDGE WILKINS Who made the determination, it had to be a person or a committee or a tribunal [10] or group. Who made the last determination?

MR. CLEMENT The last determination I think was made by no one person because there was a series of interviews and in these interviews there's obviously a constant reassessment to make sure that somebody is of intelligence value, is in fact an enemy combatant and so that last stage was really part of an ongoing process. Now, the prior determinations that were made on the field in Afghanistan were made in each case by particular officers, I don't have that information here it wasn't provided in the declaration.

JUDGE WILKINSON In response to the question of whether it's double or triple hearsay you're saying that the enemy combatant designation was made at various points along the line initially in the field by numbers of the Northern Alliance and again in subsequent interviews during the course of these various transfers.

MR. CLEMENT That's exactly right and one of the things I wanted to make clear is that –

JUDGE WILKINSON It's not just one entity that's making the designation, the designation is made in various points along the line.

MR. CLEMENT That's exactly right, and I think that's going to be the pattern in cases in which you're dealing with a battlefield detainee.

JUDGE WILKINS Was Mr. Walker [11] Lindh classified as an enemy combatant?

MR. CLEMENT I think he has been treated by the United States government as an enemy combatant, but I'm not familiar with all the steps along the process, but for Mr. Lindh, but I think some of the early steps were very similar to the steps in Mr. Hamdi's case.

JUDGE WILKINSON Let me follow up and ask you, Mr. Lindh was of course, charged and prosecuted for specific criminal acts and Mr. Hamdi has not been charged. How does the government decide which approach to take?

MR. CLEMENT Well, I guess that the short answer would be that it's a classic exercise of prosecutorial discretion, and I don't know all the factors that went in to the various determinations, there may have been a number of factors that went into that initial determination with respect to each of the individuals. I guess the thing that I would stress is that the consequence Mr. Lindh faces as a result of being put into the criminal system, is quite different than the consequences that Mr. Hamdi faces Mr. Lindh after all has been sentenced to a substantial prison term, and if as Chief Judge Wilkinson suggests if there is an end to the hostilities in Afghanistan as determined by the executive, and Hamdi is treated as being relevant to those hostilities he may well in the end face substantially less time in detention than Mr. Lindh.

[12] JUDGE WILKINSON Let me follow up just a little bit on what my good colleague has said. I'm just concerned here about the equality of treatment and Mr. Lindh facing formal charges and getting an attorney, you have Mr. Moussaui a French citizen facing formal charges.

And in terms of the arrest of terror suspects in Portland, Detroit, upstate New York, they've all been charged. Very little misconduct doesn't meet the definition or doesn't meet the elements of some Federal offense, most obviously conspiracy. But who is to say about the equality of treatment if Mr. Lindh is charged and Mr. Moussaui is charged, and Mr. Hamdi is not, is something other than caprice at work?

MR. CLEMENT Well, certainly there's something other than caprice at work there Your Honor, and I think that this is an area in which Judge Wilkins even in normal domestic context, provides substantial deference to the prosecutors in exercising their prosecutorial discretion.

JUDGE WILKINSON But clearly they are not between prosecutions and in definite detention. I mean indefinite detention is simply not an option in the domestic context, does it speak for a lack of bail hearings and arraignments and a great many other things?

MR. CLEMENT Well, certainly that's true but of course, there are vastly different penal consequences to various ways of charging an individual. And [13] often times in that context the government will decide to charge an individual with a lesser offense or treat them in a different way because they're getting cooperation from that individual or they want to keep the prospect a more significant penalty as a possibility to sort of 'beat the stick' if you will, to get more cooperation. And those same interests are involved in dealing with individuals like Hamdi and Walker Lindh and I think it's important to give discretion to the executive branch to exercise it's judgment as to how best to proceed with each of these individuals.

And I did want to also Chief Judge Wilkinson just to finish a thought that I started with, I do think the battlefield detainee situation is slightly different than a situation as with someone like Mr. Territo where there is really a point in time where determination is made. And obviously in that situation the executive branch went to a higher level of accountability and in fact went to the highest level of accountability and had the President make the determination.

JUDGE WILKINSON Yeah, I understand that Hamdi, Mr. Hamdi represents fundamentally a different situations, umm, talking about the difference in executive discretion with respect to whether to charge someone or whether to detain them, I mean is that, umm, what is the limiting principle of this enemy combatant term. Is the term enemy combatant to be confined to those like Mr. Hamdi who [14] was captured on the battlefield or in your view in the term enemy combatant would be applied to the individuals who are arrested in an airport or arrested in the course of a domestic terrorist plot. Does the executive have the authority to label someone an enemy combatant who is over here in the United States plotting a terrorist act?

MR. CLEMENT Well, first of all I want to make it clear that I don't want to end up arguing a different case than the one before us and, –

JUDGE WILKINSON I know, I am interested in knowing what the parameters of the principle are because part of the concern the unilateral declarations of designations of enemy combatant status and the application of that to American citizens and – a very open ended principle, I want to know where the limits of it lie.

MR. CLEMENT And I certainly want to be helpful on that point I just wanted to also make clear that Hamdi in many respects the prototypical classical battlefield combatant. But I think, with the short answered question is that yes, it is possible for the United States to hold an individual seized in the United States as an enemy combatant. And obviously the Quirin case provides a case in point from the World War II context, and I think the important limiting principle in that context is affiliation with the enemy. And I think that there is a difference between an individual, like [15] the individuals in Quirin who affiliate themselves with the enemy forces and an individual that is just a purely domestic act of terrorism where there's no affiliation with enemy forces.

JUDGE WILKINSON Oh, and what's the source of the executive's authority to label someone an enemy combatant? It would come from Article II Section II and the Commander in Chief clause, but isn't the – aren't the powers of the Commander in Chief that nexus to the commander and to executives in the Presidents authority as Commander Chief much greater in the battlefield situation than, you know, civilian context because if the executive branch is acting to arrest somebody on American soil who's plotting a criminal act, doesn't that simply implicate the executives authority as a law enforcement, in the normal course of law enforcement whereas the battlefield detention is much more likely to activate the executives authority as Commander in Chief, in other words, what I'm wondering, as this is a contest moves from the battlefield to civilian society doesn't the constitutional context also remove from the Commander in Chief clause to the Bill of Rights and the Sixth Amendment and the other thing that are, we normally associate as part and

parcel or criminal prosecution. And that's not concerned here, to the constitutional basis or domestic arrest if whether the Commander in Chief laws stretch that far.

MR. CLEMENT Well, Your Honor, [16] those concerns are not implicated in this case directly but let me address those concerns by saying, I certainly think that you're right to the extent that you say that the Commander in Chief authority is an important font for the authority of the executive Branch to hold enemy combatants, and that that power is at its zenith when you're in a situation as we have before us here, of capturing a battlefield detainee abroad. On the other hand I think we also know from Quirin that even if that Commander in Chief power is maybe not at its zenith, with respect to the seizure of somebody in the United States, it still is implicated and it still provides a basis for treating somebody as an enemy combatant. And again the Quirin case has many parallels to some of the other situations that may trouble Judge Wilkins in that the individuals there came to the United States in civilian dress with intent to blow up war facilities in the United States, they were seized by the FBI in New York and Chicago and yet they were treated as enemy combatants and they were not treated as ordinary criminals under Title 18. So, I say that by way of trying to be responsive to your question but I guess I'll finish where I started which is by saying, that those concerns are not implicated in this case, and this case really involves the prototypical case of an enemy combatant seized abroad.

JUDGE WILKINSON In this case, in this case, does it make no difference to Hamdi as an American citizen?

[17] MR. CLEMENT Well, I think that it makes very little difference. I mean the main difference I think it makes is that as an American citizen Mr. Hamdi would have a claim to invoke Judge Wilkins jurisdiction even if he were held abroad, but the Supreme Court in Quirin, the 9th Circuit in the Territo decision have all made clear and the 10th Circuit frankly in the Co Paw decision, have all made clear that citizenship is not a despositive factor or does not really influence the enemy combatant determination.

JUDGE WILKINSON If that was the case why was Mr. Hamdi removed from Guantonimo [sic] Bay, the executive must have thought American citizenship –?

MR. CLEMENT It may make a difference with respect to access to the American court system and so in that sense it may have made no difference from Hamdi's ability to file petition, whether it were held in Guantinomo [sic] or held in Norfolk but the government made that decision for a variety of reasons and brought Mr. Hamdi to the United States. And I don't think that decision is an odd one at all, in the sense that this is one of the major concerns in holding enemy combatants, and the reason that there's a long established authority to hold enemy combatants is precisely because you want to get them away from the battlefield so they cannot be in a position to aid others in the battle against United States Forces. And so there's been a long tradition of holding [18] enemy combatants, prisoners of war in the United States, in fact, in World War II I'm told we held over 100,000 POW's in United States Territory.

JUDGE TRAXLER Let me ask a question, in your brief you said 'transfer of an enemy combatant to the

United States – affecting the purely legal challenges', can you tell me what you're referring to and how that would affect – ?

MR. CLEMENT Well, I think like you said, one thing that it would affect is perhaps the ability to get into court in the first instance if the individual were not a United States citizen.

JUDGE TRAXLER What do you mean by in the court?

MR. CLEMENT Well, it's well established in Supreme Court precedence, specifically the Isentrader decision, an alien enemy held abroad does not have access to the United States Courts and indeed does not have an ability to bring a habeas petition. So I do think geographic locus may make some difference in that context.

JUDGE TRAXLER – effects the legal challenges and to the analysis of legal challenges?

MR. CLEMENT Once you get beyond that to the merits I suppose one might be able to imagine a situation where there would be an argument that, say [19] a substantive due process or procedural due process claim where in some kind of balancing the fact that the individual was in the United States might conceivably make a difference, I'm not sure I have a ready example. I think the point we were making in the brief though is even if you could imagine that it might affect the legal analysis, it's entirely inexplicable to me why it would affect the factual analysis. And so it's odd in my judgment that petitioners have effectively conceded and the District Court recognized this that the detention of Mr. Hamdi in Afghanistan did not raise a due process problem. It just seems to us

and I think the principle point in brief was if his detention doesn't raise a due process problem in Afghanistan, and there was a factual basis to hold him in Afghanistan, where does it become any less an enemy combatant when he's transferred to Guantonimo [sic] or in turn to Norfolk.

JUDGE TRAXLER Let me switch gears for just a second, one of the things that obviously concerns the petitioners is the fact that he is being held incommunicado and solitary confinement in a way he's not being accorded the rights that prisoners of war have. Is there a process within the military system for a prisoner or someone that can challenge this classification?

MR. CLEMENT Well, in certain circumstances in the other conflicts for example, there has been an opportunity to challenge whether one is properly held as a [20] prisoner of war or one is entitled to prisoner of war status. That's the Article V determinations you may have seen discussed in the briefs. But that's not been available in the current conflict because the President himself has made a determination that the nature of the way that the Taliban and the al-Qaida are pursuing the war in Afghanistan, means that as a group none of those individuals will qualify for prisoner of war status. And so that highly accountable Presidential determination has effectively served the same purpose as those Article V tribunals would in a different conflict.

JUDGE TRAXLER Your position is that it serves the same practical purpose? Is that the justification why he would not be entitled to have his determined by a tribunal?

MR. CLEMENT Well, functionally it serves the same practical purpose in as a more formal legal point,

that's also the Presidents interpretation of the Geneva Convention that he has satisfied the Article V requirements by making this overall determination about the status of the Taliban and the al-Qaida. One thing I think that is important just as a footnote to know about the Article V proceedings is that it traditionally doesn't function as a means of trying to figure out exactly what happened, or trying to figure out whether somebody is properly being held by the military at all. It's primary function is the language of the convention makes [21] clear is you have somebody who has admittedly committed a hostile act and then the determination is does that person qualify for the privileges of a prisoner of war. And since the President has made the determination that none of the al-Qaida, none of the Taliban qualify for prisoner of war status.

JUDGE WILKINSON Part of the determination – I understand it to be your position inside a Federal Court lacks the authority to award an Article V determination of what the Geneva Convention – authority. That is what I understand your position to be?

MR. CLEMENT It is our position Chief Judge Wilkinson, I'm saying that it hasn't been terribly robustly briefed in this particular case because the petitioners as opposed to Amica [sic] have never raised any challenge to the fact that he hasn't got –

JUDGE WILKINSON I want to get your position straight. As I understood your position with respect to Article V, was number one, that the President has made a determination that we were unlawful combatants, and as unlawful combatants they were not subject to Article V. Let's suppose now that's disputed and the opposing side

says how do we know that. I mean, I understand your position at that point and I just want to make sure that what I haven't strayed because the Amici flushed it out more than – than your brief did. That the tribunal would make a POW determination under Article V, [22] was not necessarily an Article III Court.

MR. CLEMENT Well, that's absolutely right Your Honor, – right.

JUDGE WILKINSON But for starters and the second point I understand your position to be the Geneva Conventions are not self-executing, and as a third point I understand your position to be even if they were in some way self-executing there's no indication that they are self-executing by virtue of a petition filed under 2241, umm, but I just wanted your perspective of the argument that can be – I just want to understand your position with respect to Article V. Is that an Article III court wouldn't make that determination and it would certainly not make that determination, that determination could not be set in motion by 2241 petition.

MR. CLEMENT I think all of the above is true and I would just emphasize again, as you said, it would be our position that the Geneva Convention is not self-executing with respect to Article V and that's, again we didn't get a chance to brief because kind of a quirk in the briefing schedule in this case and Amicus briefs in support of the appellees were filed after we filed the reply brief.

JUDGE WILKINSON That's why I just wanted to make sure that I understand your position because the Amici actually went into a greater extent that you had the opportunity to.

[23] MR. CLEMENT Right, no, that is our position. The only other additional point I would make which is really just a refinement of one of the points you make, is that we think the Geneva Convention provisions are not self-executing treaties and therefore not enforceable in habeas. But then we would also take the position that the Presidents determination that this overall treatment of the al-Qaida and the Taliban sufficed to take care of our Article V obligations, we think would be entitled to deference in and of itself, even if the treaty were self-executed.

JUDGE WILKINSON I'd like to ask you one little final question -- broader here. We're in the struggle I think, obviously over safety and security for American citizens and certainly that fundamentally. What we're also in the struggle to fight to preserve our own values, our own way of life and the Bill of Rights is right at the core of that when for whatever reason one argues to suspend the Bill of Rights and his application to an American citizen is not a step that is likely taken. We apply the Bill of Rights to the worst fanatics and the worst of those who are the worst traders, the worst spies, or even those who take actions which are fundamentally treacherous to country. But your opponents say that in suspending the Bill of Rights we are, this application to an American citizen we're in danger of losing our way and undercutting the very values for which those dislike us. Just [24] hold back for a moment and give me your thoughts and don't give me a pad [sic] answer but how does what is happening to Mr. Hamdi consonant with basic American values as they are expressed in our constitution. I understand how they are consistent with our values of safety and security, but how

long, is this consistent with our values of Liberty and Freedom, tell me that?

MR. CLEMENT Well, I mean I appreciate the question and frankly I appreciate the opportunity to respond to any suggestion that the Bill of Rights is in any way been suspended is in fact, neither the writ of habeas corpus nor the Bill of Rights has been suspended in this area. But it's also, I think very important to know that the Supreme Court in all sorts of context has made clear that the Bill of Rights in the particular provision an issue in the petitions filed by petitioners, the Fifth Amendment has by, it takes its reference point from history. And for 200 years it's been clear that the government has the ability to protect its individuals and protect society and hold and detain individuals in the context of ongoing hostilities. And so there's nothing inconsistent with exercising that executive authority and the Bill of Rights. And in particular I think that it would be a mistake to suggest that somehow this is a new erosion of rights because the Quirin decision made clear over 50 years ago that the government does have the authority to detain enemy combatants, and that case arose in the context [25] which I think you suggested is even more problematic from a Liberty standpoint which is, individual seized domestically in the United States. And yet for over 50 years since the Quirin decision those principles that are actually 150 years older than Quirin have lived, coexisted peacefully with the Bill of Rights and so I really don't think that there's anything inconsistent with the authority that is asserted here, was asserted 50 years ago in World War II and has been asserted in every major conflict in United States history, and the Bill of Rights which has also been around for 200 years.

JUDGE TRAXLER In the Quirin case these saboteurs were charged and they were afforded attorneys and the right to speak and that's a far cry different than the treatment Mr. Hamdi has received.

MR. CLEMENT Well, I think that the important –

JUDGE TRAXLER – It's like the Quirin decision and I keep wondering about the military and the lawyers they had and what about the other rights they recorded. You know of any case other than perhaps the Pedia case where individuals were confined under the same circumstances as Mr. Hamdi?

MR. CLEMENT Well, I guess I would say with respect to Quirin, the critical difference I think is not just that it was in front of a military commission or they [26] were given lawyers, but I think that the critical distinction is the government in that case sought and obtained with respect to six of the eight individuals, the death penalty. And again I think that's the fundamental difference, in Quirin an entire line of cases recognizes that in dealing with the enemy during war, there's more than one option for the Executive Branch and for the military authorities. If they want they can hold the individuals and hold them until the end of the hostilities, to detain them, to keep them from the battlefield and to gather intelligence. They also wholly independent of that have the option of charging them with specific war crimes. And of course historically all war crimes were punishable by death, and so that's a very different regime and I think the consequences are very different. And no one suggests, certainly no one in the executive branch suggests that if at a point Mr. Hamdi, Mr. Territo or some other individual is, if a

decision is made to try to prosecute them for particular war crime, there's no suggestion that they wouldn't have counsel to defend them in that type of prosecution. But that's simply a very different situation than you have with the authority to detain individuals for more preventive purposes during wartime.

JUDGE TRAXLER Can you think of any circumstances where somebody who is classified as an enemy combatant – shouldn't be given an opportunity – .

MR. CLEMENT I'm not sure that I [27] can think of, no one case comes to mind but that's not because there's no possibility that any enemy combatant could ever make a sufficient showing on habeas. It's more than I think you would likely see is I believe the proper focus is on what the governments showing is or what the governments evidence is. I can certainly imagine a case where the government said that someone was being held as an enemy combatant, not because they were seized on the battlefield but because they took steps that represent a violation of State Title 18 of the United States Code. And I think any court reviewing that would probably say, 'well, that's not a basis to hold somebody as an enemy combatant' and they would either issue the writ or give the government one more chance to come up with a reasonable basis for holding the individual and that would be the end of it.

You could also imagine that situation which I guess is similar where there's some legal defect in the theory under which the government is holding somebody as an enemy combatant. And I do think as we said in the briefs and I think was also made clear in the earlier round of briefing, that the principle office of the writ of habeas corpus in

these enemy combatant cases is going to be to mount legal challenges to the detention rather than challenge the specific facts, just because I think those factual determinations especially the ones made in the battlefield, are uniquely a subject to which Judge Wilkins owe substantial deference's. If there are no further questions.

[28] JUDGE WILKINSON

MR. CLEMENT No further questions. Thank you, Your Honor. Thank you.

JUDGE WILKINS Mr. Dunham, we'd be happy to hear from you.

MR. DUNHAM Good afternoon, Your Honors. We stumbled into this thing largely because we thought it was going to be a criminal case. When they separated Mr. Hamdi out from all of the prisoners down at Guantanimo and brought him back here as we read in the papers because he was a U.S. citizen, we assumed we were looking at another John Walker Lindh case and that's how we started into this thing and we had no idea what a 'can of worms' we were opening when we did that.

But I would like to call Judge Wilkins attention back to, what I would call square one which is Article I Section 9 of the U.S. Constitution which deals, which is often referred to as the suspension clause in which it says 'the privilege of a writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it'. Now there's been no suspension of the writ of habeas corpus and the right of Article III court to hear cases brought under that provision of the Constitution. And since 1867, the procedure in habeas corpus cases

has contemplated a petition, a response and a traverse that's the –

[29] JUDGE WILKINS I'm not sure how you can say that there's been an infraction of Article I or how the writ has in any way been suspended. This is the third oral argument in this appeal with extensive proceedings before the District Court, we've had thousands of pages or hundreds of pages of briefs and in a sense the process of this case has been greater than any 2241 case that I can remember. In view of all this attention and process and I don't think we've come to the conclusion that the writ has been suspended simply because you may not achieve a favorable resolve or because the writ may not be eventually granted, that wouldn't mean that it is somehow on that account been suspended.

MR. DUNHAM Well, it's Your Honor, it's like saying I have a car but I don't have any wheels. I mean there's an important part of the procedure in a habeas corpus proceeding and without this part it really isn't a habeas corpus proceeding. That's the traverse, Section 2243 sets forth that the applicant or the person detained may under oath deny any of the facts set forth in the return or allege any other material facts, that's part in parcel of what we think of when we think of habeas corpus. The petitioner says 'I'm unlawfully detained' the jailer comes forward and gives the grounds for the detention and the facts that support the detention, and then at that point the petitioner has the right to file a traverse. Without the traverse we really don't have a habeas corpus proceeding [30] here. And the government's position is that its factual response from Mr. Mobbs ends this case, and we say it basically for purpose of this case –

JUDGE WILKINSON You seem to indicate that the right to file a traverse is the right to have all of these facts that you may dispute litigated or resolved to the fullest extent.

MR. DUNHAM Well, the extent to which it may be litigated may be a question that will require as much attention as we've already spent on this matter. What I'm, uh, I think a footnote in one of the Amicus briefs filed by Baker and Hostettler in support of the government's position here to me is illustrative. It says quote "Hamdi however has not claimed that he was a member of the Northern Alliance either mistaken for a Taliban or set off for nefarious purposes by his colleagues". Of course he hasn't claimed that because he hasn't claimed anything in this case. Nobody's talked to him, nobody knows what his version of the facts might be. And what we're saying is somehow –

JUDGE WILKINSON But that begs the question doesn't it Mr. Dunham, because the question is whether the executive can detain without charge and whether the detention itself or the fact of detention in itself is lawful. And when you read the Quirin case it says by universal or it says lawful combatants are subject to capture and detention as [31] prisoners of war by opposing forces. Unlawful combatants are likewise subject to capture and detention. Why does the executive here lack the lawful authority to detain Mr. Hamdi? Why does this unlawful detention in any sense in view of the Quirin case and in view of Article II Section II?

MR. DUNHAM Well, Your Honor, first off Quirin doesn't say that a person who is being held as an enemy combatant has no right to file a petition for writ of

habeas corpus. Judge Wilkins asked a question when Mr. Clement was standing here, "Well, what circumstances could be raised that could challenge the designation of a person as enemy combatant" and Mr. Clement couldn't think of one. But the problem is it doesn't matter who it is, it doesn't matter under the procedures in the process that we're talking about here, nobody could challenge it. Because if the government came in with an affidavit saying 'the man is an enemy combatant', it's next case, he doesn't get to say 'but that's wrong that didn't happen that way'.

JUDGE WILKINS Let me ask you this just so that we're, what we agreed on you and your colleagues from the government. Am I correct in stating that you do not challenge the legality of his initial seizure and detention in Afghanistan?

MR. DUNHAM Yes, that's correct but it needs an explanation here. We believe that as was said in [32] Baker v. Carr, deference is not something, that is a product of reason and not a product of habit. But when you have a decision to detain somebody on a battlefield where it's dangerous and people are going to get killed if you make the wrong call, the highest degree of deference is due at that particular time. The further we get away from the battlefield, the further removed we get from a situation of danger and get back into our situation that we have here in the United States with courts open, a U.S. citizen, an ability to adjudicate the thing more carefully than a Sergeant can who may be ducking bullets at the same time he's taking somebody into capture, the less deference that needs to be accorded. Now, we are not saying that we agree that the initial detention decision was an accurate one, we're simply saying that it was illegal one.

JUDGE WILKINSON Mr. Dunham, I'm not sure I understand your point that less deference should somehow be accorded the executive depending on where it all took place. Where the prisoner of war, the enemy combatant is held. For example, the governments need to obtain intelligence which seemed to be just as important in Guantonimo Bay or in Norfolk as it would be in Afghanistan if intelligence is a long-going, long-standing, ongoing operation. In the dangers, we're speaking of danger, the danger of taking a battlefield scenario and relitigating it in court would appear to be just as serious in Norfolk or Guantanimo as it is in Afghanistan. With the danger [33] of diverting resources from ongoing conflict would even be greater if the forces in Afghanistan who were trying to litigate a case in Norfolk. It just seems to me that the National Security interest in safeguarding the confidentiality of intelligence don't simply disappear because the detainee is transported to Norfolk, so I'm really mystified as to why you the level of deference somehow evaporates or dissipates depending on the place or the location. I always thought the operative legal test was the one of duration of hostility and not the place of the location, that would be really introducing quite a few wrinkles in the law, would it not?

MR. DUNHAM Well, Your Honor, if I suggested that the place or the location was the 'be all' and the 'end all' of the determination I misspoke, because I didn't mean to suggest that. Clearly the fact that there was an emergency, a state of emergency with regard to Afghanistan and the Taliban at the time that Mr. Hamdi was initially taken into detention. And the fact that there is not now such a state of emergency with regard to Afghanistan or the Taliban would be a material factor in determining how

much deference you're going to give to an executive decision to continue to detain him, what –

JUDGE WILKINSON Are we going to get into the balance with the state of emergency in Afghanistan and with the extensiveness of the procedures here?

[34] MR. DUNHAM Courts don't do that they look at the proclamations of the Chief Executive to determine what the situation is. And the President has said that the state of emergency with Afghanistan and the Taliban is at an end. He said it in the middle of this proceeding on July the 2nd is when he made that proclamation and I respectfully suggest that courts should be guided and should give deference to what the Chief Executive says about the state of emergency with respect to the Taliban and the Afghanistan situation, and that that does have a bearing on how much deference you give to a military determination to continue to hold somebody.

JUDGE WILKINSON You say that the Article I Section 9 of the writ of habeas corpus is dependent on your ability to file a traverse. How far should we go in challenging all this, um, do you think the District Court was correct in ordering the government to produce material in its August 16 order, is that your view?

MR. DUNHAM I believe that the District Court concluded that the Mobbs Declaration was not enough, it was at least –

JUDGE WILKINSON Mr. Dunham, I ask you determinately I want to know how far you're prepared to go in challenging the governments designation. The District Court in its August 16 order asked for all the interview notes with Mr. Hamdi to be turned over, wanted

the names and [35] addresses of everyone who interviewed Hamdi. Wanted the names of the Northern Alliance forces or statements of the Northern Alliance forces. Always a part of challenging this enemy combatant designation in your judgment was that a proper exercise of discretion?

MR. DUNHAM Well, I believe that that request could have been trimmed back some, but I definitely believe that if you have statements out there for Mr. Hamdi that have been taken and that Mr. Mobbs is relying on for his affidavit there's no reason why those statements, which I understand are not classified for National Security reasons couldn't be produced in the case. And why they wouldn't go a long way towards helping to resolve this matter.

JUDGE WILKINSON If we require statements and notes of interviews to be produced before District Judges, as a general matter, aren't statements and notes of interviews with detainees likely, what do they do to this case, I'm not sure, but aren't statements and notes of interviews likely to contain the most sensitive intelligence information, the very things that underline the detention in the first place?

MR. DUNHAM Well, I Your Honor, it's very well possible that they could, but we understand here that the District Judge was limited to the Mobbs Declaration, he really wasn't supposed to be considering anything except that. And in the Mobbs Declaration he doesn't [36] say anything about any intelligence value for Mr. Hamdi or that his statements would contain intelligence and therefore can't be revealed to the District Court. I mean it seems to me that if you're go –

JUDGE WILKINSON I'm talking about the production order of August 16th which incorporated the production requirement for July 31st. And the difficulty I'm having with it is, if we set a precedent that said the District Court in its discretion in asking for those interview notes and statements to be turned over, you know I don't know of any detentions, I don't even know where the plans are with respect to Iraq or I don't know how many detentions will result from that conflict, and if those detentions, if those detainees, if those statements from the detainees gave as a result of some precedent we set, we'd be subject to production in Federal District Court. Well, I'm concerned about that because I think the statements of those detainees and the notes of those interviews are likely to contain highly sensitive information of great value for our forces in the field, and so I'm really concerned about the kind of precedent that August 16th order says. We haven't gone through all the different parts of it but just initially in asking for those statements to be turned over to the, do you understand the basis of my concern?

MR. DUNHAM Yes, Your Honor, I believe that we're not talking about a floodgate situation here [37] because we're only talking, this would only apply to a U.S. citizen. An enemy alien couldn't open up his files and get a U.S. District Court to undertake a habeas corpus proceeding on him. Mr. Hamdi as far as I know, is the only person out of all the detainees that were gathered up on the battlefield in Afghanistan that's in this particular situation. We're talking about a U.S. citizen, one person not hundreds and thousands of people asking for their files.

JUDGE WILKINSON We don't really know again, I still have no idea what happened in another

country in another conflict. It's not inconceivable that a great many captives were taken that there would be a number of U.S. citizens among them, that's not impossible. I'm worried about the Presidential value here of the materials they would require. For example, another thing that was required is statements by members of the Northern Alliance and what does this say about our ability to fight a war with the help of allies. Everyone agrees that fighting a war with the help of allies is a good thing, but if this August 16th order stands and our allies happen to capture somebody or it could be Britain or Turkey or any number of countries could come upon an enemy combatant in the course of a foreign field war. If we upheld this August 16th order, the British commanders and Turkish commanders and others who joined us in any fight, would be subject to having their statements produced or their depositions taken in a Federal [38] judicial proceeding and where does that go? In other words, what I'm concerned about is being drawn in step by step, increment by increment into something that's damaging to the operation of the Article I and Article II war-making powers. I'm worried about wading in over my head with these production requests and these document requests. The interview notes, the statements by the members of the Northern Alliance trouble me, could you put my mind at rest about this?

MR. DUNHAM Well, I can tell you that the statements of Mr. Hamdi are not classified, a U.S. District Judge in the Eastern District of Virginia has already seen them, Judge Ellis in the Lindh case and the lawyers for John Walker Lindh have seen them. Now it seems to me that if the government has already shown those type of statements and used them in a criminal case, that there

can't be any harm to the Republicans showing them to Judge Doumar down in Norfolk.

JUDGE WILKINSON And they did make them public?

MR. DUNHAM No, they're under a protective order for use only for the purposes of litigation in the John Walker Lindh case. But of course, as soon as John Walker Lindh's lawyers saw those statements by Mr. Hamdi the first thing he wanted to do was see Hamdi. He called me [and] said "I want to see Hamdi, you're his lawyer can I see him?" I said, "I can't even see him, how can I get you in to see him?" [39] but the fact is –

JUDGE WILKINSON Is it your judgment that the materials that the District Court requested should be turned over in camera and redacted?

MR. DUNHAM My belief is that these are things that can, are best worked out at the trial court level. It's my judgment that if the government felt that giving up statements of the Northern Alliance was a problem, that they would go to the Judge and they would say 'this is a problem and here's why' and that documents would be redacted to protect National Security information, I'm going through this to fairly well in the Hamdi case right now, thousands and thousands of classified information regarding the War on Terror and we're able to deal with it. All they have to do is redact it, the information is not relevant to the detention of Hamdi –

JUDGE WILKINSON Right, well then you say that this should be, that this could be submitted in camera?

MR. DUNHAM And it could be submitted not only in camera but it could be Judge Doumar ordered it submitted Exparte [sic], now –

JUDGE WILKINSON Well, then that leads me to a whole another set of questions, because if this could be submitted Exparte [sic] and in camera and is subject to redaction, we're going to have a whole set of secrecy issues and [40] a whole different set of legal disputes. For example, you're already quarreling in your briefs over what the scope of the redaction request was. I don't know if we'd be quarreling over the scope of redaction, and as you know from cases in the Sixth Circuit or Third Circuit dealing with the secrecy of, or openness of degradation hearing, cases in the D.C. Circuit meeting with whether the names of detainees need be disclosed. If we upheld the August 16 order we'd be creating a whole pantaplave [sic] of secrecy issues and disclosure issues around this litigation. The very things that are now being litigated as a collateral matter in all of these other circuits isn't it? I mean isn't it better to have whatever decision is made in Hamdi's case at least be made out in the open and if Judge, the District Courts order seems to presage a path of Exparte [sic] communications in chambers or in camera conferences, that's going to lead to doubt and suspicion and all kinds of things, all kinds of disclosure battles, ongoing disclosure battles. Why would we ever go down that path?

MR. DUNHAM Well, Your Honor, my brief is, is that should have been and I argued this to Judge Doumar, that should have been avoided by simply finding a way to allow Hamdi to see the Mobbs Declaration and comment upon it as to whether he disagreed with it in any particular, whether there were any additional facts that he'd like to call to Judge Wilkins attention. It doesn't have to be in

an unmonitored meeting with counsel type scenario, there have to [41] be creative ways –

JUDGE WILKINSON To do that he'd have to have counsel?

MR. DUNHAM He would or it would have to be done through counsel of course, Your Honor, and it could be with a military guard sitting there that I meet with him, I show him the thing and say what have you got to say about this. But it seems to me that's the cleanest way, the most open way to give the public confidence that this is not a secret proceeding, to give the public confidence that the man had an opportunity to meet with a lawyer and to set forth his side of the case and to present that back to Judge Doumar. And it just short-circuits all of this stuff. And it doesn't seem to me to be a –

JUDGE WILKINSON What you're saying here is that this goes back into the fundamental right as a right to meet with an attorney.

MR. DUNHAM I'm saying that it's all wrapped up, inextricably intertwined with the habeas corpus right. If habeas corpus is to mean anything, it means that the man has to be given an opportunity to confront the allegations against him and it means that he should have counsel in order to do that.

JUDGE WILKINSON – If he should have counsel Mr. Dunham in the normal case counsel is going [42] to advise the client to be quiet I don't but I think that's counsels job and I respect counsel for doing that but that means the only way that the United States of America is ever going to get intelligence out of the detainee is through plea negotiations or negotiations over a grant of

immunity, and doesn't this strike you as an odd circumstance to have our government negotiating with the enemy and battlefield combatants over pleas and immunity grants I mean what – does any other country or have we in the past required the executive branch to negotiate with people who have taken up arms against the United States to enter plea negotiations and immunity negotiations in order to gather intelligence. And that's, once again I'm worried about getting drawn in to some very deep waters.

MR. DUNHAM Well, I can understand that Your Honor, and all I can say is that I completely, one of the things that's been bothering me about all the press reports since 9/11 is the notion that when lawyers go in there they cause the client to shut up. That's not necessarily the case often times counsel can promote a situation where the person begins to talk when he wasn't talking before. As we sit here right now we –

JUDGE WILKINSON We've increased your leverage in plea negotiations and increase your leverage in immunity proceedings, you'd want to hand over as little information as possible and that means that our intelligence [43] gathering efforts would be seriously impaired.

MR. DUNHAM But of course, if they were intending to prosecute the man Your Honor, they shouldn't be, if there's any thought that they're setting this man up for prosecution they shouldn't be in there interrogating him to get information which they would then use against him in a criminal case. This is not that context, this, we're not in a criminal case here we're in a civil habeas corpus proceeding and the meeting that I'm suggesting wouldn't have to necessarily be a one on one attorney client privilege meeting, although you would get the best result you

get the most confidence from the client, he trusts you the most if that was the setting in which it occurred. I mean you go in there with the military guard sitting there he might not feel free to speak his mind on the true circumstances of his capture. But I do believe that the concern that you expressed with regard to the scope of the District Courts production order would be solved, if we could get Mr. Hamdi to just speak and find out if we have any factual differences. Then Judge Wilkins could focus in like a laser beam on those issues where there are factual discrepancies, if in fact there are any. Now I know that during World War II, the only case that's reported that's even similar to this case is the Territo case, where the man challenged his status as an enemy combatant, as a prisoner of war, he was a U.S. citizen, he was being held in California. And he filed a [44] habeas corpus case and the whole case is eerily similar to this one. And I have the transcript of it and he had a lawyer and the government produced live witnesses and there was cross-examination and there was testimony, and there was argument to the jury and we still won World War II. So, what I'm trying to say is that we're to a certain extent we're blazing new ground certainly in the Fourth Circuit, but what I'm trying to say is that 56 years ago a District Court in California dealt with the exact same kind of case as this, where a gentleman was trying to contend, 'you know I was grabbed on the battlefield, yeah I have partial Italian uniform on, but I wasn't an enemy combatant I was forced into labor, I was working with them', and that issue was litigated in a U.S. District Court and the, uh, both sides had counsel, the government didn't send in a two-page declaration that left open more questions than it answered, it brought in the Provost General to testify. An official of sufficient rank came in and testified and was

cross-examined and when it was all over the District Judge said, 'yeah, he's an enemy combatant he can be detained' and it was over, it was over like that.

JUDGE WILKINS So you're saying in this case if you were at such a hearing as Territo had and the Judge said, "you're an enemy combatant and – and – I'm still going" then you would concede his detention is lawful?

MR. DUNHAM That's fine, we're [45] not saying that the United States cannot detain enemy combatants with –

JUDGE WILKINS – Judge Doumar's findings he was in Afghanistan, he was with the Taliban, he went there to fight, he had a rifle, are we to credit any of the statements or findings that Judge Doumar had?

MR. DUNHAM Well, it'd be, only if you credit all the statements he made I mean uh, I think that the bottom line is those statements were made based on a one-sided presentation of facts that we've never had a chance to respond to. And that there shouldn't be any factual findings until you have a complete record and a complete record which should include some input from the petitioner.

JUDGE WILKINSON When you use phrases like factual discrepancies or complete record, isn't the only way to resolve the factual discrepancies because there are always going to be denials of one's status as an enemy combatant, I mean isn't the only way to resolve those by deposing commanders in the field? Judge Doumar asked at the August 13th hearing he said, "has this man ever fired a rifle?" Well, how can we, whether he fired a rifle may be

important or germane in his status as an enemy combatant, and yet to make that determination wouldn't we have to step so far out of our shoes as Judges and bring battlefield scenarios back into Judge Wilkins room and depose American commanders in [46] the field and depose members of the Northern Alliance to sort of determine the status with real certainty. Because good lawyers are skeptics by nature and that's one of the reasons I admire them so much, they should be skeptics and beyond a reasonable doubt requires that they be skeptics, but this is a totally different context. We're talking about a foreign theater of conflict and it's not a crime that was committed in Norfolk, it's not a crime that was committed in Richmond or anywhere in the venue. And I would think the burdens on the military would be considerable to be litigating the circumstances of the capture half way around the world. The litigation then would be taking place in Afghanistan, we're going to have American commanders in Afghanistan or Iraq or some other place litigating a case in Norfolk. So it gives us some sort of judicial process in Norfolk even if it's no more than a deposition. Apart from the time that it takes, aren't the logistics of that kind of situation going to be difficult to manage?

MR. DUNHAM It would depend on the nature of the factual dispute if there even was one.

JUDGE WILKINSON You know there's going to be one don't you?

MR. DUNHAM I note, no, there can be one but let me just say Your Honor, before I notice that my times up can I make a –

JUDGE WILKINS You get Mr. [47] Clement went over you get to go over to.

MR. DUNHAM I wanted to touch on a couple of additional points. One is, when you asked me about what, why did the geographical location make any difference. I believe that the geographical location does have some degree of difference because once you bring Mr. Hamdi, who is a U.S. citizen into the United States you suddenly have to confront 18USC4001(A), now we've addressed that in our brief but it talks about no U.S. citizen it doesn't say no person, so it's directed solely at U.S. citizens, and it says 'no U.S. citizen may be held or detained in any way except by act of Congress' and we would respectively submit that the architects of the conflict between that statute and Mr. Hamdi's current detention is the government when they moved him here, precisely because he was a U.S. citizen. I still don't understand in my own mind why it was the military brought him here thinking it would have some effect on his legal status, we believe it does we believe it brings him right in the cross-hairs –

JUDGE WILKINSON If we have taken your reading of the statute wouldn't that prohibit the detention of enemy combatants that would have to be American citizens even in Afghanistan as long as the agent of detention was the United States it would be an impermissible detention according to your reading of the statute.

MR. DUNHAM – Your Honor, my [48] reading of the statute and my reading of the case law is that exterritorial application of the statute is not to be presumed and that courts of course would most –

JUDGE WILKINSON – we'd be lost – on the statute if we did that it's just your reading of the statute is

that no citizen should be imprisoned or otherwise detained by the United States, if we take that language as you want us to take it it would prohibit even the capture or detention of an American citizen in Afghanistan?

MR. DUNHAM This is without charge and there, when you have an American citizen taking up arms or acting in conjunction with a foreign power, there are plenty of statutes that Congress has authorized that he can be charged with. All that statute says is that you got to charge him, you can't just detain him without charge. So, I wanted to correct that point.

JUDGE WILKINS – 4001(A) before?

MR. DUNHAM Well, I believe Your Honor, that if you consider that the issue of whether or not the case should be dismissed at this point is before you than 4001(A) is, but if you're limiting your review –

JUDGE WILKINS – we're not –

MR. DUNHAM But if you're limiting your review right now to simply whether Judge Doumar appropriately ordered production from the government, [49] and whether or not the Mobbs Declaration is adequate to support the detention, if that's all that you're considering at the present time then 4001(A) is not before you.

JUDGE WILKINS What can we consider at the present time under the appropriate – ?

MR. DUNHAM I think under the, under 1292B the appropriate issues before you are whether or not the Mobbs Declaration standing alone and without any other information is adequate to support the detention. And second, whether or adequate to provide opportunity for

meaningful judicial review, and second, whether or not if not, whether the production order that Judge Doumar entered was an appropriate exercise of discretion on his part in trying to get additional information that would make him comfortable that he was providing meaningful judicial review to the petitioner.

JUDGE WILKINS There are other issues alleged by you one is the 4001(A) issue and the other is the cessation of hostilities, is that correct?

MR. DUNHAM That's correct.

JUDGE WILKINS Those are two basis [sic] on which you say Mr. Hamdi should be released.

MR. DUNHAM That's correct.

JUDGE WILKINS Have either of those issues been addressed by the District Court?

MR. DUNHAM And neither has [50] been yet addressed by the District Court. We asked them to, we asked the District Judge to address those issues so that when we came up here on the certification everything would be before Judge Wilkins but he declined and those two issues still remain untouched by him.

JUDGE WILKINS We said in our earlier decision that if he is adjudged to be an enemy combatant then his detention is a lawful one.

MR. DUNHAM Your Honor, I don't believe that you said adjudicated to be, I believe Your Honor said if he is an enemy combatant then the detention is lawful. And that begs the question because we still don't know whether

he is an enemy combatant or not. That is the $64 dollar question that remains to be answered.

Now, I would just like to close by saying that a decision made on a battlefield as to whether a person is an enemy combatant under exigent circumstances and without the exacting fact-finding procedures of a court or even of a military tribunal is entitled to the highest degree of deference regardless of the likelihood that it may be factually flawed. Because of the circumstances under which it is made. Almost a year later in circumstances much less exigent where the emergency that was being addressed at the time of capture, by the Presidents own declaration has been ended. And we're concerned for accuracy in the determination can be given more consideration. There is [51] no need to give the same degree of deference to the initial battlefield decision.

To allow an American citizen, captured on a foreign battlefield but now in the United States, to avail himself of the statutory procedures ordinarily available in habeas corpus proceedings is not a floodgate opening process. Nothing in the Mobbs Declaration suggests that there would be any harm to or interference with military or National Security efforts to follow these time-tested procedures for habeas corpus cases that are a hallmark of our Liberty. And while I have nothing but praise for the current administration in its efforts to combat terrorism, the precedent it wants to set here, while perhaps expedient for the moment has long-term potential for incursion on our liberties and it should be rejected for that reason. Thank you Your Honor. I'm sorry Your Honor.

JUDGE WILKINSON Judge Traxler has some questions for you. Mr. Dunham, I'm curious about where

this hearing is headed in the District Courts so what I'd like you to do tell me if you had your way and you got everything you wanted, how do you see this hearing in the District Court evolving?

MR. DUNHAM Well, if I had my way and I got everything I wanted Your Honor, I'd be allowed to take the Mobbs Declaration over to Mr. Hamdi and he would read it and he'd say "Yep, that's right everything in there's [52] correct" and the case would be over, but life is not that simple.

JUDGE TRAXLER Give me your worst-case scenario.

MR. DUNHAM Worst case scenario is I take it over to him and I show it to him and he says 'I didn't have a rifle and I had already decided to join the Northern Alliance but I got in an argument with a buddy there and the next thing I know I was turned over to the Americans as a captured Taliban, which I never was'. Ok, he says that exactly the scenario hypothesized by one of the Amici in their brief, at that point I believe that the District Judge is going to have to conduct a factual inquiry. He's going to have to hear testimony.

JUDGE TRAXLER All right, he's going to hear testimony on these statements that Hamdi will testify?

MR. DUNHAM I would expect at that point if he was disagreeing with Mr. Mobbs that he would either testify or be allowed to file an affidavit, or bring his views before JUDGE WILKINS in some manner or fashion.

JUDGE TRAXLER What's the government going to do? How are they going to present the evidence?

MR. DUNHAM Government's going to cross him. Government's going to do what they did in [53] the Territo case, they're going to bring in government officials who may, some may have personal knowledge of the situation, some may be testifying from hearsay. It's in that context that I would give the executive maximum deference to avoid inconvenience, to avoid interference with the government functions but still require them to come forward and in some way answer what Mr. Hamdi asserts.

JUDGE TRAXLER But ultimately the District Judge in your scenario is going to have to make a credibility determination as to who's telling the truth, is that right?

MR. DUNHAM They may or may not have them because –

JUDGE TRAXLER – Let's take worst-case scenario.

MR. DUNHAM Worst case scenario.

JUDGE TRAXLER And Hamdi says 'I didn't have a gun I didn't shoot anybody, I'm not in anybody's military' and the military says 'yes he was he was shooting', just like a worst-case scenario. Ultimately in your view the District is going to have to make a credibility determination. One persons telling the truth and one is not, isn't that correct?

MR. DUNHAM Yes, and that consistently happens in habeas corpus cases.

[54] JUDGE TRAXLER So under your scenario it could happen a Judge could say 'I just don't believe the soldiers so I'm going to order him to turn him loose and

take him back to Afghanistan and think about it or I'll take you back over to the enemy country where we're fighting. That would be the result ultimately of the situation that you –

MR. DUNHAM Except he's a U.S. citizen so he can be released here.

JUDGE TRAXLER So you would have Judges making credibility decision in judging actions taken by the military through the war and overruling their decisions?

MR. DUNHAM Only with regard to U.S. citizens. Not with regard to enemy aliens. I mean we're only talking about a U.S. citizen's right not to be held indefinitely without ever having an opportunity to confront the basis for the detention. And we're limiting it to that, I don't believe that we'd be opening up the floodgates to enemy aliens challenging the decisions of their captors on a battlefield Your Honor.

JUDGE TRAXLER All right, let me ask you along those lines let me ask you in that regard, if an alien is in the United States is he entitled to Constitutional – rights under the Constitution?

MR. DUNHAM Generally speaking yes, but if he was brought here as an enemy, as a [55] prisoner of war I'm not sure that that's the case. There are a line of cases out there that suggest that his presence here does not change his legal status and does not give him any additional rights. The U.S. citizen has the Constitution following him wherever he goes. But if you brought an alien here there are some cases that suggest that the fact that the military chose as a matter of convenience to hold the

prisoners of war here, that that would not open up the U.S. Courts on habeas proceedings to them.

JUDGE TRAXLER Your case is dependent on Mr. Hamdi being a U.S. citizen?

MR. DUNHAM Oh absolutely, I think if he was not a U.S. citizen we wouldn't be talking about this.

JUDGE TRAXLER What showing do you have that the military made and in your judgment and what's your position, what is it in regard to showing that there's a burden that the military and government have with regard to show adequate justification for – as an enemy combatant.

MR. DUNHAM Well, I believe that you first off would have to get the issues crystallized by the response, and then the government would have to show some evidence as to why Mr. Hamdi should not be believed. And in that context I believe that the weighing of the evidence problem should give deference to the government.

[56] JUDGE TRAXLER They're only required to show some element of why he shouldn't be believed, why would we go beyond looking at the governments evidence?

MR. DUNHAM Well, I don't believe in –

JUDGE TRAXLER There's been no evidence that he was an enemy combatant, I don't understand why –

MR. DUNHAM Well, I don't believe that the some evidence standard is appropriate because, there could be, we've had cases in the immigration context where they were relying on the some evidence standard.

JUDGE TRAXLER I understand you don't think that's right but I want you to tell me what is right, what you think the standard should be?

MR. DUNHAM I think the standard should be the preponderance of the evidence but with deference to the government. I mean, I think that a court should if you had a Sergeant testifying as to what he saw and you had Hamdi disputing it, I think that that ought to come down in favor [of] the Sergeant if it was that way. That's where I think the deference –

JUDGE WILKINSON – You think the preponderance of the evidence in response to Judge Traxler, [57] who would bear the burden in that case, the government would bear the burden would they not?

MR. DUNHAM In the normal habeas corpus case that's correct, the respondent bares the burden of justifying the detention.

JUDGE WILKINSON How can we satisfy their burden without calling American commanders either taking their depositions or calling them away from their battlefield or combat duties to answer a report because the most persuasive evidence that Judge Traxler points out is the credibility contest. If you refer those things as a swearing contest, you're not going to have Mr. Hamdi swearing against Mr. Mobbs, it's going to be the word of the battlefield commander before the word of the Northern Alliance commander against the word of Mr. Hamdi. Doesn't that just lead the battlefield right into the courtroom?

MR. DUNHAM Well, Your Honor, that's what they did in the Territo case but I would respectfully

suggest that it's our freedoms, they don't come cheap, they come often times with a lot of inconvenience. But when you want to detain an American citizen indefinitely there is some burden that comes along with that, and it all can't be swept away with 'well, this is inconvenient for the military", there's going to be some inconvenience. My suggestion is that it be minimized, that that's where the deference comes in, in this [58] process, affidavits, hearsay, ought to be admitted, documents could be introduced in lieu of live testimony. The shape of a hearing that would be held to resolve factual disagreements if there were any is something that is in my view, yet to be decided.

JUDGE WILKINSON It's not a question of whether or not the military is deserving of trust, that's a policy matter. It's really a question of where the Constitution locates the element of judgment and the Constitution doesn't locate in a wartime situation, the Constitution doesn't locate the ultimate judgment, the element of judgment within the judicial branch. It presupposes we have at least a modicum of trust in those who are Constitution or quote "consigned to the war making authority". It's not because they deserve it or they don't deserve it, it's because our Constitution reposes it in them.

MR. DUNHAM But it's not a political question, it is an issue that is reviewable by courts. Nobody has said that the writ of habeas corpus doesn't apply in a situation of an American citizen who is being detained indefinitely by the military. Go back to Judge Wilkins question, he asked Mr. Clement "Can you think of a scenario where somebody could challenge an enemy combatant status" I mean suppose it was an ABC newspaper guy that was photographing something the military didn't want him to

[59] photograph. So they called him an enemy combatant and they introduced an affidavit that this person was an enemy combatant, he was photographing National Security material and he wasn't supposed to be there, he's detained, he was on the battlefield. It seems to me the man ought to be able to say 'no, no I was there from ABC News, I had a press pass", or raise the First Amendment, whatever he wants to raise. But that would be impossible under the procedure that we're sitting with right now because he wouldn't be able to see a lawyer, wouldn't be able to bring his side of the case forward.

JUDGE WILKINSON Because you'd have every television station in the country breathing down your neck –

MR. DUNHAM Well, I'm pondering the ridiculous, but the ridiculous is often times what we have to look to to look at the consequences of what we're talking about here. The government is not talking about limiting the use of his power to the battlefield. They believe we're in a worldwide chase against these al-Qaida types, they want to be able to call any one of them an enemy combatant at any point in time and detain him without charge.

JUDGE WILKINSON Mr. Dunham, I think Judge Traxler may have some more questions for you.

JUDGE TRAXLER Your position is Mr. Mobbs position is apparently not the one that's most [60] adequate for you to accept – it's sufficient to justify detention. Who do you think or who should be the person or what rank should the person have in order to do that?

MR. DUNHAM Well, I think as a policy matter I think accountability when you're going to detain the

American citizen indefinitely is important. And if the administration thinks it's important enough to do that they ought to have somebody go out on a limb who has been appointed and confirmed by the Senate and has a reasonable position before that can happen.

THE COURT

MR. DUNHAM Well, you know Your Honor, it's hard to explain except that I know that a wiretap context they wanted the Attorney General on the authorization for the wire. It's because when you're entrenching on the Civil Liberties of American citizens you want accountability, you want political accountability, you don't want the decision buried so far down in the bureaucracy that a particular administration could just easily walk away from it.

Second, I don't believe that Mr. Mobbs is testifying at all, he's acting like a summary witness. He's coming in here with an affidavit saying, "I read this, I saw that", he's just simply reviewing the file and trying to summarize what's in the file. It seems to me that –

[61] THE COURT

MR. DUNHAM No, I agree, a Presidential appointee wouldn't do much different however, I would say that I setting forth the caveat that I don't think a declaration like that is ever adequate without hearing from the other side of the case, but if it could be it certainly would be more complete than the declaration that we got from Mr. Mobbs which for example, doesn't even explain why the man's in Norfolk, doesn't explain why he's in the Norfolk Navy Brig, doesn't explain anything about his current detention. Ok.

THE COURT

MR. DUNHAM That's correct and I don't see a problem with that. I don't see a problem with a hearsay declaration coming in to explain why the man's being held. My problem is in not being able to have the other side be able to review it and say whether or not it's accurate.

THE COURT

MR. DUNHAM Thank you Your Honor.

THE COURT

MR. CLEMENT Thank you, Your Honors, I'd just like to make a few points in rebuttal. First Mr. Dunham started out with emphasizing the need for a traverse and the need for a petitioner to be able to file a traverse. And it's a little puzzling because if you look at the joint appendix, [62] the traverse that they did file in the District Court and it's [sic] attachments cover a little over 60 pages of the joint appendix from pages 63 to 128. So, I gather that Mr. Dunham's objection is not so much that they didn't get to file a traverse, which they did, but is more broadly that this case didn't proceed like an ordinary habeas case. That there wasn't the same opportunity to bring in evidence, there wasn't the same opportunity for review. And it seems to me that this court made clear in its early opinion in this case, that this is indeed not an ordinary habeas case, that this arises is in a uniquely sensitive context and that the procedures need to be administered with a sensitivity to that context. And I think that the respondents, I'm sorry the appellees are really taking issue with that decision of this court. And in response to Judge Traxler Mr. Dunham made a variety of points about exactly how they would envision the proceeding taking place on remand. It's clear just from their brief on page 41 of their brief, that what they envisioned is in

fact a De Novo standard of review in the District Court. And that might be, that doesn't even seem like the standard that's usually applied in an ordinary habeas case. It's certainly not the standard that should apply in this uniquely sensitive context.

Another point I would like to emphasize is as a –

THE COURT

MR. CLEMENT Well, I mean, that's the habeas cases that we've come to be most familiar [63] with when there's a Federal habeas challenge to say a state criminal conviction. But of course the traditional office of the writ of habeas corpus involved other kinds of executive determinations where there hadn't been a full-blown trial like the extradition context for example. And yet they're still was just a some evidence standard of review, so I don't think there was really a precedent for a De Novo standard of review.

THE COURT

MR. CLEMENT Well, I certainly think it is Your Honor, and I think that's true for a couple of reasons. One is that the gist of the District Courts order was that the Mobbs Declaration was not sufficient to justify the detention, and it seems to me that tied up with that is the notion that the declaration and the Motion to Dismiss that accompanied it were not sufficient to resolve the case. And I think they are in fact sufficient, and I think that's true because –

THE COURT

MR. CLEMENT Well, because of the order itself, the August 16th order found the Mobbs Declaration

insufficient to resolve the case and so, as I say tied up with that is the notion that the Mobbs Declaration and the accompanying Motion to Dismiss are not sufficient, because if JUDGE WILKINS had made the alternative conclusion and said, 'the Mobbs Declaration is sufficient to resolve the case', then that would be the end of proceedings in the District Court.

[64] THE COURT

MR. CLEMENT That's right, or another way of looking at it is the Mobbs Declaration more than satisfies the government's obligation to provide some factual basis for its detention. But this case has always been about that factual basis and the legal challenges that petitioners have mounted to that detention.

THE COURT

MR. CLEMENT Well, I think that's right, I also think that the District Court, to be frank if you look at joint appendix page 423 when you have an opportunity, he actually viewed this courts prior decision as effectively resolving at least the 4001(A) question. He read this courts statement that 'if Mr. Hamdi is indeed an enemy combatant, then his present detention is lawful' to largely resolve questions like 4001(A), which as you recall were raised by petitioners in the earlier appeal.

I also would say that I think that if you think there's any question about whether they're fairly included, but you think this may be a case where it's close to the edge, then I would really urge Judge Wilkins to find this as a case where it is fairly included. Because I think there are independent virtues to having this case resolved. I think that having this issue, having allegations that the United

States is holding this individual without lawful authority, having those allegations in the air is [65] not helpful and the government's position is that, and I think the Fourth Circuit largely recognized, that this court largely recognized it last time around, that Mr. Hamdi is in fact being detained pursuant to the well-established authority of the Commander in Chief to hold enemy combatants. And I think it would be a benefit to everyone to have that issue definitively resolved.

THE COURT

MR. CLEMENT Well, Judge Wilkins, the cessation of hostilities issue was not directly implicated in the District Court proceeding but I think that may have come up at various points during the hearing. There is a sense in which the starting point for all of this should be the petition, and the petition only raised a Fifth Amendment issue and a suspension of the writ issue that was based on the November 13th Presidential order for military commissions. That latter claim has fallen out of the case because I think everyone understands that Mr. Hamdi's not being detained pursuant to that November 13th order. Now the petitioner's legal arguments have been something of a moving target, but if, I mean certainly the due process issue was raised and that I think was fairly before the District Court. And I think that again since the gist of the District Courts order was that the Mobbs Declaration was not sufficient and before we did anything else we're going to get all this additional evidence [66] that's contemplated by the production order. I don't see how that order is not consistent with the idea that he's rejected our Motion to Dismiss, I mean you don't order the production of all sorts of sensitive National Security information in additional evidence if you accept the governments Motion to Dismiss.

That kind of evidencery [sic] production order is inconsistent with, and I would suggest a defacto rejection of the Motion to Dismiss the government filed that did implicate all these issues, I mean I'd like to comment just on a couple of those issues. I think that idea that the war is over is just I think flatly inconsistent with reality, and petitioners rely on a few Presidential determinations to be an economic emergency with the Taliban regime has been suspended by the substitution of regime. That certainly doesn't seem like the fact that the United States is trying to help rebuild a Nation-State in Afghanistan is inconsistent with the notion that there are hostilities still ongoing there, because there very much are and the war unfortunately has not come to an end in Afghanistan.

With respect to 4001(A), Chief Judge Wilkinson you pointed out that one problem with that is that the statute by its terms may apply extraterritorially. Another problem with that seems to me is that the logic of their position means that the United States can never hold a citizen as an enemy combatant under the laws of war, under the Presidents Commander in Chief power no matter how compelling the showing, no matter [67] what procedures are afforded. Their view of 4001(A) is an absolute bar and I think there are plenty of reasons including the simple fact that it's located in Title 18 of the US Code, the fact that the very next subsection expressly exempts military facilities to conclude that's not what Section 4001(A) is all about.

THE COURT

MR. CLEMENT Well, I don't know if it's inconsistent with it –

THE COURT

MR. CLEMENT Well, I think they can, I think if you were to hold that 4001(A) had application in this situation, and so the executive needed to point to a statutory authorization for its authority to hold Mr. Hamdi I think the joint resolution of Congress might provide that kind of authority.

THE COURT

MR. CLEMENT Well, I completely agree with that and then my point would be but to the extent 18USC4001(A) prohibits detention without Congressional authorization, the joint resolution provides the necessary authorization.

THE COURT

MR. CLEMENT Well, I think that might be one way to look at it. Another way to look at it would [68] be that the statute itself provides the necessary authorization. But the potential conflict between those two provisions that you outlined, I think just reinforces what I think is the best and single best answer to this question which is if 400 –

THE COURT

MR. CLEMENT Well, I don't think that Congress would expressly avert and create an exception for something that they just didn't envision the statute reaching at all. And I think that even one of the sponsors, we point this out in our reply brief, even one of the sponsors of the legislation, then Representative Migva pointed out that there was no need for some kind of exception for the Presidential authority under the Commander in Chief power because Congress doesn't even have any authority to affect that in the first place. And so I think that may be

a better explanation for why 4001(A) doesn't have an express exemption of military detentions under the Commander in Chief power. I see my time expired so I'm happy to stop or I was going to make one or two more points but whatever Judge Wilkins would prefer.

THE COURT

MR. CLEMENT No, and that was actually one of points I was hoping to make which is, the Territo case, and the first thing to understand about the Territo case is that it is not a right to counsel case. Nothing in the Territo case says that there's a right to counsel to challenge [69] your detention. The holding of Territo which is I don't think helpful to the petitioners, is that it doesn't matter if you're an American citizen you still may be held as an enemy combatant or as a prisoner of war. Now it's true that as a factual matter, Mr. Territo did have access to counsel. But I think in order to understand why that's true, nobody said he had a right to it, it's just that he in fact had access to counsel. And I think in order to understand that you have to understand the very different circumstances that were at issue there. Mr. Dunham said, "Well, Mr. Territo got access to counsel and yet we still won World War II". But Mr. Territo was given access to counsel after the form, after the cessation of hostilities with Italy, at that point Italy was already one of our allies.

And just in a more practical matter, the way that prisoners of war were being treated at that time during World War II, they were given substantial rights, they could go to the cinema on Saturday night. And under circumstances like that it wouldn't make any sense to deny somebody a right to counsel if they already were allowed those kind of interactions with other individuals.

And I think that the fact that Mr. Hamdi is being detained under the circumstances that he is being detained, suggests that the government has very different interests in the present conflict.

THE COURT

MR. CLEMENT Well, I'd like to be [70] very specific about that because it is not true that all the information that Judge Doumar addressed in his production order was given to counsel in the Lindh case, at least that's my understanding. The intelligence information, the intelligence interviews that Judge Doumar has ordered produced were not at issue there. There was some law enforcement interview notes that were given to counsel in that case. But I think that it's important to understand that some of the information Judge Doumar seeks is not covered by that.

THE COURT

MR. CLEMENT Sure.

THE COURT

MR. CLEMENT It is produced pursuant to an effort by defense counsel to obtain Brady material. And I think that's part of the reason why that precedent doesn't really apply here, because as the Supreme Court emphasized just last term in the Rouis decision the Brady right is just a trial right so it wouldn't apply outside of the context of somebody being, somebody facing criminal charges.

THE COURT

MR. CLEMENT Right, it was reviewed under the procedures that are specifically supplied for criminal

cases that seek the statute and of course, those materials although they were not classified are in fact sensitive which is why as Chief Judge Wilkinson noted they're still [71] subject to a protective order in that case.

THE COURT

MR. CLEMENT Well, I think that we'd be very reluctant to do that, and part of the reason for that is something that Chief Judge Wilkinson indicated, which is the concern about the precedent that would be set by doing so. Because it may be that the law enforcement interview notes or at least some of them, don't involve absolutely classified information but as I say, they do involve sensitive information. There may be other cases where those reports involve classified information, certainly information that would be of tremendous value to our adversaries, to counter-intelligence agents within our adversaries, if they ever became public.

THE COURT

MR. CLEMENT I don't think we would and I think that the government has tried to balance an interest in making clear that, we certainly want to give people the reassurance that Mr. Hamdi is a prototypical enemy combatant and he is somebody who, under any definition of the enemy combatant would be detainable as an enemy combatant. And so we wanted to provide a fair amount of information in the declaration. We balanced that against the concern about setting a precedent by providing more information that might well be available in other cases where somebody is seized in the battlefield and it's just not possible to recreate that much [72] information. Or whether an individual, you could have a situation where somebody was seized on the battlefield and the military

has every reason to believe that that individual was an enemy combatant but the person's story in the interrogations always is that they weren't there under those circumstances. And there are a variety of reasons why the government might be, it was reluctant to set that precedent by providing more information than would be necessary in a prototypical case.

THE COURT

MR. CLEMENT That's correct. And I think that the petitioners have made that clear throughout the litigation. And I think that is common ground between the parties. Thank you.

JUDGE WILKINSON Before we adjourn.

316 F.3d 450

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

YASER ESAM HAMDI; ESAM FOUAD HAMDI, as next friend of Yaser Esam Hamdi,

Petitioners-Appellees,

v.

DONALD RUMSFELD; W. R. PAULETTE, Commander,

Respondents-Appellants.

[CENTER FOR CONSTITUTIONAL RIGHTS; 140 LAW PROFESSORS AND 19 INTERESTED ORGANIZATIONS; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; AMERICAN CIVIL LIBERTIES UNION; ACLU FOUNDATION OF VIRGINIA,]

Amici Curiae in support of Appellees

[RUTH WEDGEWOOD; SAMUEL ESTREICHER; DOUGLAS W. KMIEC; DAVID B. RIVKIN, JR.; LEE A. CASEY; DARIN R. BARTRAM,]

Amici Curiae in Support of Appellants

No. 02-7338

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Robert G. Doumar, Senior District Judge.
(CA-02-439-2)

Argued: October 28, 2002

Decided: January 8, 2003

Before WILKINSON, Chief Judge and WILKINS and TRAXLER, Circuit Judges.

Reversed and remanded with directions to dismiss by published opinion. Opinion by WILKINSON, Chief Judge, and WILKINS and TRAXLER, Circuit Judges, in which all three concur.

COUNSEL

ARGUED: Paul Clement, Deputy Solicitor General, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Frank Willard Dunham, Jr., Federal Public Defender, Norfolk, Virginia, for Appellees. **ON BRIEF:** Paul J. McNulty, United States Attorney, Gregory G. Garre, Assistant to the Solicitor General, David B. Salmons, Assistant to the Solicitor General, Lawrence R. Leonard, Managing Assistant United States Attorney, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Larry W. Shelton, Assistant Federal Public Defender, Geremy C. Kamens, Assistant Federal Public Defender, Norfolk, Virginia, for Appellees. David B. Rivkin, Jr., Lee A. Casey, Darin R. Bartram, BAKER & HOSTETLER, L.L.P., Washington, D.C., for Amici Curiae Ruth Wedgwood, et al. Shayana Kadidal, Barbara Olshansky, Michael Ratner, William Goodman, CENTER FOR CONSTITUTIONAL RIGHTS,

New York, New York, for Amici Curiae Center for Constitutional Rights, et al. Steven D. Benjamin, Richmond, Virginia; Donald G. Rehkopf, Jr., BRENNA & BRENNA, Rochester, New York, for Amicus Curiae Association of Criminal Defense Lawyers. Steven R. Shapiro, Lucas Guttentag, Arthur N. Eisenberg, Robin Goldfaden, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Rebecca K. Glenberg, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, Richmond, Virginia, for Amici Curiae ACLU, et al.

OPINION

WILKINSON, Chief Judge, and WILKINS and TRAXLER, Circuit Judges:

Yaser Esam Hamdi filed a petition under 28 U.S.C. § 2241 challenging the lawfulness of his confinement in the Norfolk Naval Brig.[1] On this third and latest appeal, the United States challenges the district court's order requiring the production of various materials regarding Hamdi's status as an alleged enemy combatant. The district court certified for appeal the question of whether a declaration by a Special Advisor to the Under Secretary of Defense for Policy setting forth what the government contends were the circumstances of Hamdi's capture was sufficient by itself to justify his detention. Because it is undisputed that Hamdi was captured in a zone of active

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[1] The court expresses its appreciation to the Public Defender's Office for the Eastern District of Virginia, the United States Attorney's Office for the Eastern District of Virginia, and the Solicitor General's Office for the professionalism of their efforts throughout these expedited appeals.

combat in a foreign theater of conflict, we hold that the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution. No further factual inquiry is necessary or proper, and we remand the case with directions to dismiss the petition.

I.

As recounted in earlier appeals regarding Hamdi's detention, *Hamdi v. Rumsfeld,* 294 F.3d 598 (4th Cir. 2002) ("*Hamdi I*"), and *Hamdi v. Rumsfeld,* 296 F.3d 278 (4th Cir. 2002) ("*Hamdi II*"), the al Qaida terrorist network, utilizing commercial airliners, launched massive attacks on the United States on September 11, 2001, successfully striking the World Trade Center in New York City, and the Pentagon, the military headquarters of our country, near Washington, D.C. A third unsuccessful attack upon at least one additional target, most likely within Washington, D.C., was foiled by the efforts of the passengers and crew on the hijacked airliner when it crashed in Somerset County, Pennsylvania, southeast of Pittsburgh. In total, over 3,000 people were killed on American soil that day.

In the wake of this atrocity, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). The President responded by ordering United States armed forces to

Afghanistan to subdue al Qaida and the governing Taliban regime supporting it. During this ongoing military operation, thousands of alleged enemy combatants, including Hamdi, have been captured by American and allied forces.

The present case arises out of Hamdi's detention by the United States military in Norfolk, Virginia. Hamdi apparently was born in Louisiana but left for Saudi Arabia when he was a small child. Although initially detained in Afghanistan and then Guantanamo Bay, Hamdi was transferred to the Norfolk Naval Station Brig after it was discovered that he may not have renounced his American citizenship. He has remained in Norfolk since April 2002.

In June 2002, Hamdi's father, Esam Fouad Hamdi, filed a petition for writ of habeas corpus, naming as petitioners both Hamdi and himself as next friend.[2] The petition alleged that Hamdi is a citizen of the United States who was residing in Afghanistan when he was seized by the United States government. According to the petition, "[i]n the course of the military campaign, and as part of their effort to overthrow the Taliban, the United States provided military assistance to the Northern Alliance, a loosely-knit coalition of military groups opposed to the Taliban Government," and thereby "obtained access to individuals held by various factions of the

[2] This court has previously determined that Esam Fouad Hamdi is a proper next friend. *Hamdi I,* 294 F.3d at 600 n.1. Two earlier petitions filed by the Federal Public Defender for the Eastern District of Virginia Frank Dunham and Christian Peregrim, a private citizen from New Jersey, were dismissed. Neither Dunham nor Peregrim had a significant relationship with the detainee, and Hamdi's father plainly did. *Id.* at 606.

Northern Alliance." The petition further alleges that "Hamdi was captured or transferred into the custody of the United States in the Fall of 2001" in Afghanistan, transported from Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba, in January 2002, and ultimately transferred to the Norfolk Naval Station Brig in Norfolk, Virginia, in April 2002.

Although acknowledging that Hamdi was seized in Afghanistan during a time of active military hostilities, the petition alleges that "as an American citizen, . . . Hamdi enjoys the full protections of the Constitution," and that the government's current detention of him in this country without charges, access to a judicial tribunal, or the right to counsel, "violate[s] the Fifth and Fourteenth Amendments to the United States Constitution." By way of relief, the petition asks, inter alia, that the district court: (1) "Order Respondents to cease all interrogations of Yaser Esam Hamdi, direct or indirect, while this litigation is pending"; (2) "Order and declare that Yaser Esam Hamdi is being held in violation of the Fifth and Fourteenth Amendments to the United States Constitution"; (3) "To the extent Respondents contest any material factual allegations in th[e] Petition, schedule an evidentiary hearing, at which Petitioners may adduce proof in support of their allegations"; and (4) "Order that Petitioner Yaser Esam Hamdi be released from Respondents' unlawful custody."

On June 11, before the government had time to respond to the petition, the district court appointed Public Defender Frank Dunham as counsel for the detainee and ordered the government to allow the Defender unmonitored access to Hamdi. On July 12, we reversed the district court's order granting counsel immediate access to Hamdi.

Hamdi II, 296 F.3d at 279. We cautioned that Hamdi's petition involved complex and serious national security issues and found that the district court had not shown proper deference to the government's legitimate security and intelligence interests. We did not order the petition dismissed outright, however, noting our reluctance to "embrac[e] [the] sweeping proposition . . . that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Id.* at 283. Rather, we sanctioned a limited and deferential inquiry into Hamdi's status, noting "that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." *Id.* (citing *Ex parte Quirin,* 317 U.S. 1, 31, 37 (1942)). We also instructed that, in conducting the inquiry, "the district court must consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Id.* at 284.

Following this remand, the district court held a hearing on July 18. During this hearing, the court expressed its concern over possible violations of Hamdi's rights as an American citizen. The court also questioned the government's most basic contentions regarding the ongoing hostilities, asking "with whom is the war I should suggest that we're fighting?" and "will the war never be over as long as there is any member [or] any person who might feel that they want to attack the United States of America or the citizens of the United States of America?" The court directed that "[a]ll of these [answers should] be provided in the answer that the government is to file to

the petition" and directed the United States to file such a response to Hamdi's petition by July 25.

On July 25, the government filed a response to, and motion to dismiss, the petition for a writ of habeas corpus. Attached to its response was an affidavit from the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs, which confirms the material factual allegations in Hamdi's petition – specifically, that Hamdi was seized in Afghanistan by allied military forces during the course of the sanctioned military campaign, designated an "enemy combatant" by our Government, and ultimately transferred to the Norfolk Naval Brig for detention. Thus, it is undisputed that Hamdi was captured in Afghanistan during a time of armed hostilities there. It is further undisputed that the executive branch has classified him as an enemy combatant.

In addition to stating that Hamdi has been classified as an enemy combatant, the Mobbs declaration went on further to describe what the government contends were the circumstances surrounding Hamdi's seizure, his transfer to United States custody, and his placement in the Norfolk Naval Brig. According to Mobbs, the military determined that Hamdi "traveled to Afghanistan in approximately July or August of 2001" and proceeded to "affiliate[] with a Taliban military unit and receive[] weapons training." While serving with the Taliban in the wake of September 11, he was captured when his Taliban unit surrendered to Northern Alliance forces with which it had been engaged in battle. He was in possession of an AK-47 rifle at the time of surrender. Hamdi was then transported with his unit from Konduz, Afghanistan to the Northern Alliance prison in Mazar-e-Sharif, Afghanistan and, after a prison uprising there, to a prison at

Sheberghan, Afghanistan. Hamdi was next transported to the U.S. short term detention facility in Kandahar, and then transferred again to Guantanamo Bay and eventually to the Norfolk Naval Brig. According to Mobbs, interviews with Hamdi confirmed the details of his capture and his status as an enemy combatant.

In keeping with our earlier instruction that the district court should proceed cautiously in reviewing military decisions reached during sanctioned military operations, we directed the district court to first "consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further." Following this order, the district court held a hearing on August 13 to review the sufficiency of the Mobbs declaration.

During this hearing, the district court recognized that "the government is entitled to considerable deference in detention decisions during hostilities." The court also noted that it did not "have any doubts [Hamdi] had a firearm [or] any doubts he went to Afghanistan to be with the Taliban." Despite these observations, however, the court asserted that it was "challenging everything in the Mobbs' declaration" and that it intended to "pick it apart" "piece by piece." The court repeatedly referred to information it felt was missing from the declaration, asking "Is there anything in here that said Hamdi ever fired a weapon?" The court questioned whether Mr. Mobbs was even a government employee and intimated that the government was possibly hiding disadvantageous information from the court.

The district court filed an opinion on August 16, finding that the Mobbs declaration "falls far short" of supporting Hamdi's detention. The court ordered the

government to turn over, among other things, copies of Hamdi's statements and the notes taken from any interviews with him; the names and addresses of all interrogators who have questioned Hamdi; statements by members of the Northern Alliance regarding the circumstances of Hamdi's surrender; and a list of the date of Hamdi's capture and all of the dates and locations of his subsequent detention.

Upon the Government's motion to certify the August 16 production order for immediate appeal, the district court certified the following question: "Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?" We then granted the Government's petition for interlocutory review pursuant to 28 U.S.C.A. § 1292(b). In so doing, we noted that "this court 'may address any issue fairly included within the certified order because it is the order that is appealable, and not the controlling question identified by the district court.'" *Hamdi v. Rumsfeld*, No. 02-7338 (4th Cir. Sept. 12, 2002) (order granting petition for interlocutory review) (quoting *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996)).

II.

Yaser Esam Hamdi is apparently an American citizen. He was also captured by allied forces in Afghanistan, a zone of active military operations. This dual status – that of American citizen and that of alleged enemy combatant – raises important questions about the role of the courts in times of war.

A.

The importance of limitations on judicial activities during wartime may be inferred from the allocation of powers under our constitutional scheme. "Congress and the President, like the courts, possess no power not derived from the Constitution." *Ex parte Quirin,* 317 U.S. 1, 25 (1942). Article I, section 8 grants Congress the power to "provide for the common Defence and general Welfare of the United States . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support armies . . . [and] To provide and maintain a navy." Article II, section 2 declares that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."

The war powers thus invest "the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war." *Quirin,* 317 U.S. at 26. These powers include the authority to detain those captured in armed struggle. *Hamdi II,* 296 F.3d at 281-82.[3] These powers likewise

[3] Persons captured during wartime are often referred to as "enemy combatants." While the designation of Hamdi as an "enemy combatant" has aroused controversy, the term is one that has been used by the Supreme Court many times. *See, e.g., Madsen v. Kinsella,* 343 U.S. 341, 355 (1952); *In re Yamashita,* 327 U.S. 1, 7 (1946); *Quirin,* 317 U.S. at 31.

extend to the executive's decision to deport or detain alien enemies during the duration of hostilities, *see Ludecke v. Watkins,* 335 U.S. 160, 173 (1948), and to confiscate or destroy enemy property, *see Juragua Iron Co. v. United States,* 212 U.S. 297, 306 (1909).

Article III contains nothing analogous to the specific powers of war so carefully enumerated in Articles I and II. "In accordance with this constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." *Hamdi II,* 296 F.3d at 281.

The reasons for this deference are not difficult to discern. Through their departments and committees, the executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not. The Constitution's allocation of the warmaking powers reflects not only the expertise and experience lodged within the executive, but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection and to ask the ultimate sacrifice from them. Thus the Supreme Court has lauded "[t]he operation of a healthy deference to legislative and executive judgments in the area of military affairs." *Rostker v. Goldberg,* 453 U.S. 57, 66 (1981).

The deference that flows from the explicit enumeration of powers protects liberty as much as the explicit enumeration of rights. The Supreme Court has underscored this founding principle: "The ultimate purpose of this separation of powers is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v.*

Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991). Thus, the textual allocation of responsibilities and the textual enumeration of rights are not dichotomous, because the textual separation of powers promotes a more profound understanding of our rights. For the judicial branch to trespass upon the exercise of the warmaking powers would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical. This right of the people is no less a right because it is possessed collectively.

These interests do not carry less weight because the conflict in which Hamdi was captured is waged less against nation-states than against scattered and unpatriated forces. We have emphasized that the "unconventional aspects of the present struggle do not make its stakes any less grave." *Hamdi II*, 296 F.3d at 283. Nor does the nature of the present conflict render respect for the judgments of the political branches any less appropriate. We have noted that the "political branches are best positioned to comprehend this global war in its full context," *id.*, and neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches.

B.

Despite the clear allocation of war powers to the political branches, judicial deference to executive decisions made in the name of war is not unlimited. The Bill of Rights which Hamdi invokes in his petition is as much an instrument of mutual respect and tolerance as the Fourteenth

Amendment is. It applies to American citizens regardless of race, color, or creed. And as we become a more diverse nation, the Bill of Rights may become even more a lens through which we recognize ourselves. To deprive any American citizen of its protections is not a step that any court would casually take.

Drawing on the Bill of Rights' historic guarantees, the judiciary plays its distinctive role in our constitutional structure when it reviews the detention of American citizens by their own government. Indeed, if due process means anything, it means that the courts must defend the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (internal quotation marks omitted). The Constitution is suffused with concern about how the state will wield its awesome power of forcible restraint. And this preoccupation was not accidental. Our forbears recognized that the power to detain could easily become destructive "if exerted without check or control" by an unrestrained executive free to "imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure." 4 W. Blackstone, *Commentaries on the Laws of England* 349-50 (Cooley ed. 1899) (quoted in *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968)).

The duty of the judicial branch to protect our individual freedoms does not simply cease whenever our military forces are committed by the political branches to armed conflict. The Founders "foresaw that troublous times would arise, when rulers and people would . . . seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable

law." *Ex Parte Milligan,* 71 U.S. (4 Wall.) 2, 120 (1866). While that recognition does not dispose of this case, it does indicate one thing: The detention of United States citizens must be subject to judicial review. *See Hamdi II,* 296 F.3d at 283.

It is significant, moreover, that the form of relief sought by Hamdi is a writ of habeas corpus. In war as in peace, habeas corpus provides one of the firmest bulwarks against unconstitutional detentions. As early as 1789, Congress reaffirmed the courts' common law authority to review detentions of federal prisoners, giving its explicit blessing to the judiciary's power to "grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment" for federal detainees. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82. While the scope of habeas review has expanded and contracted over the succeeding centuries, its essential function of assuring that restraint accords with the rule of law, not the whim of authority, remains unchanged. Hamdi's petition falls squarely within the Great Writ's purview, since he is an American citizen challenging his summary detention for reasons of state necessity.

C.

As the foregoing discussion reveals, the tensions within this case are significant. Such circumstances should counsel caution on the part of any court. Given the concerns discussed in the preceding sections, any broad or categorical holdings on enemy combatant designations would be especially inappropriate. We have no occasion, for example, to address the designation as an enemy combatant of an American citizen captured on American

soil or the role that counsel might play in such a proceeding. *See, e.g., Padilla v. Bush,* No. 02 Civ. 445 (MBM), 2002 WL 31718308 (S.D.N.Y. Dec. 4, 2002). We shall, in fact, go no further in this case than the specific context before us – that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces.

The safeguards that all Americans have come to expect in criminal prosecutions do not translate neatly to the arena of armed conflict. In fact, if deference to the executive is not exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain. For there is a "well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, [and] enemy belligerents, prisoners of war, [and] others charged with violating the laws of war." *Duncan v. Kahanamoku,* 327 U.S. 304, 313-14 (1946) (footnotes omitted). As we emphasized in our prior decision, any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect this deference as well as "a recognition that government has no more profound responsibility" than the protection of American citizens from further terrorist attacks. *Hamdi II,* 296 F.3d at 283.

In this regard, it is relevant that the detention of enemy combatants serves at least two vital purposes. First, detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies. "The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front . . . ." *In re Territo,* 156 F.2d 142, 145

(9th Cir. 1946). In this respect, "captivity is neither a punishment nor an act of vengeance," but rather "a simple war measure." W. Winthrop, *Military Law and Precedents* 788 (2d ed. 1920). And the precautionary measure of disarming hostile forces for the duration of a conflict is routinely accomplished through detention rather than the initiation of criminal charges. To require otherwise would impose a singular burden upon our nation's conduct of war.

Second, detention in lieu of prosecution may relieve the burden on military commanders of litigating the circumstances of a capture halfway around the globe. This burden would not be inconsiderable and would run the risk of "saddling military decision-making with the panoply of encumbrances associated with civil litigation" during a period of armed conflict. *Hamdi II,* 296 F.3d at 283-84. As the Supreme Court has recognized, "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Johnson v. Eisentrager,* 339 U.S. 763, 779 (1950).[4]

[4] The government has contended that appointment of counsel for enemy combatants in the absence of charges would interfere with a third detention interest, that of gathering intelligence, by establishing an adversary relationship with the captor from the outset. *See Hamdi II,* 296 F.3d at 282 (expressing concern that the June 11 order of the district court "does not consider what effect petitioner's unmonitored access to counsel might have upon the government's ongoing gathering of intelligence"). That issue, however, is not presented in this appeal.

The judiciary is not at liberty to eviscerate detention interests directly derived from the war powers of Articles I and II. As the nature of threats to America evolves, along with the means of carrying those threats out, the nature of enemy combatants may change also. In the face of such change, separation of powers doctrine does not deny the executive branch the essential tool of adaptability. To the contrary, the Supreme Court has said that "[i]n adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny . . . lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch." *Mistretta v. United States,* 488 U.S. 361, 381 (1989). If anything, separation of powers bears renewed relevance to a struggle whose unforeseeable dangers may demand significant actions to protect untold thousands of American lives.

The designation of Hamdi as an enemy combatant thus bears the closest imaginable connection to the President's constitutional responsibilities during the actual conduct of hostilities. We therefore approach this case with sensitivity to both the fundamental liberty interest asserted by Hamdi and the extraordinary breadth of war-making authority conferred by the Constitution and invoked by Congress and the executive branch.

III.

After the district court issued its August 16 production order, it granted respondent's motion for an interlocutory appeal of that order. The following question was certified for our review:

> Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?

As the Supreme Court has made clear, we are not limited to this single question. Rather, an appellate court may address any issue fairly included within the certified order, because "it is the *order* that is appealable, and not the controlling question identified by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun,* 516 U.S. 199, 205 (1996) (internal quotation marks omitted).

On this appeal, it is argued that Hamdi's detention is invalid even if the government's assertions were entirely accurate. If that were clearly the case, there would be no need for further discovery such as that detailed in the August 16 production order, because Hamdi's detention would be invalid for reasons beyond the scope of any factual dispute. Indeed, any inquiry into the August 16 production order or any discussion of the certified question would be unnecessary, because neither could suffice to justify a detention that, as a threshold matter, was otherwise unlawful. Moreover, the burden of the August 16 order would necessarily outweigh any benefits if, quite independent of the disputed factual issues, Hamdi were already entitled to relief. *See* Fed. R. Civ. Proc. 26(b)(1)-(2). For that reason, any purely legal challenges to Hamdi's detention are fairly includable within the scope of the certified order. *See Juzwin v. Asbestos Corp.,* 900 F.2d 686, 692 (3d Cir. 1990) (stating that, on § 1292(b) review of an order denying a dispositive motion, an appellate court is "free to consider all grounds advanced in support of the grant of [the motion] and all grounds suggested for sustaining its denial" (internal quotation marks omitted)).

In this vein, Hamdi and amici have in fact pressed two purely legal grounds for relief: 18 U.S.C. § 4001(a) and Article 5 of the Geneva Convention. We now address them both.[5]

A.

18 U.S.C. § 4001 regulates the detentions of United States citizens. It states in full:

> (a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.
>
> (b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended[,] and the applicable regulations.
>
> (2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

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[5] We reject at the outset one other claim that Hamdi has advanced in abbreviated form. He asserts that our approval of his continued detention means that the writ of habeas corpus has been unconstitutionally suspended. *See* U.S. Const. art. I, § 9. We find this unconvincing; the fact that we have not ordered the relief Hamdi requests is hardly equivalent to a suspension of the writ.

18 U.S.C. § 4001 (2002). Hamdi argues that there is no congressional sanction for his incarceration and that § 4001(a) therefore prohibits his continued detention. We find this contention unpersuasive.

Even if Hamdi were right that § 4001(a) requires Congressional authorization of his detention, Congress has, in the wake of the September 11 terrorist attacks, authorized the President to "use *all necessary and appropriate force* against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) (emphasis added). As noted above, capturing and detaining enemy combatants is an inherent part of warfare; the "necessary and appropriate force" referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops. Furthermore, Congress has specifically authorized the expenditure of funds for "the maintenance, pay, and allowances of prisoners of war [and] other persons in the custody of the [military] whose status is determined . . . to be similar to prisoners of war." 10 U.S.C. § 956(5) (2002). It is difficult if not impossible to understand how Congress could make appropriations for the detention of persons "similar to prisoners of war" without also authorizing their detention in the first instance.

Any alternative construction of these enactments would be fraught with difficulty. As noted above, the detention of enemy combatants serves critical functions. Moreover, it has been clear since at least 1942 that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." *Quirin*, 317

U.S. at 37. If Congress had intended to override this well-established precedent and provide American belligerents some immunity from capture and detention, it surely would have made its intentions explicit.

It is likewise significant that § 4001(a) functioned principally to repeal the Emergency Detention Act. That statute had provided for the preventive "apprehension and detention" of individuals inside the United States "deemed likely to engage in espionage or sabotage" during "internal security emergencies." H.R. Rep. 92-116, at 2 (Apr. 6, 1971). Proponents of the repeal were concerned that the Emergency Detention Act might, inter alia, "permit[] a recurrence of the round ups which resulted in the detention of Americans of Japanese ancestry in 1941 and subsequently during World War II." *Id.* There is no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen captured on the battlefield during wartime may be treated like the enemy combatant that he is. We therefore reject Hamdi's contention that § 4001(a) bars his detention.

B.

Hamdi and amici also contend that Article 5 of the Geneva Convention applies to Hamdi's case and requires an initial formal determination of his status as an enemy belligerent "by a competent tribunal." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135.

This argument falters also because the Geneva Convention is not self-executing. "Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action."

Goldstar (Panama) v. United States, 967 F.2d 965, 968 (4th Cir. 1992). The Geneva Convention evinces no such intent. Certainly there is no explicit provision for enforcement by any form of private petition. And what discussion there is of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inhering in sovereign nations. If two warring parties disagree about what the Convention requires of them, Article 11 instructs them to arrange a "meeting of their representatives" with the aid of diplomats from other countries, "with a view to settling the disagreement." Geneva Convention, at art. 11. Similarly, Article 132 states that "any alleged violation of the Convention" is to be resolved by a joint transnational effort "in a manner to be decided between the interested Parties." *Id.* at art. 132; *cf. id.* at arts. 129-30 (instructing signatories to enact legislation providing for criminal sanction of "persons committing . . . grave breaches of the present Convention"). We therefore agree with other courts of appeals that the language in the Geneva Convention is not "self-executing" and does not "create private rights of action in the domestic courts of the signatory countries." *Huynh Thi Anh v. Levi,* 586 F.2d 625, 629 (6th Cir. 1978) (applying identical enforcement provisions from the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Feb. 2, 1956, 6 U.S.T. 3516, 75 U.N.T.S. 287); *see also Holmes v. Laird,* 459 F.2d 1211, 1222 (D.C. Cir. 1972) (noting that "corrective machinery specified in the treaty itself is nonjudicial").

Hamdi provides no reason to conclude that 28 U.S.C. § 2241 makes these diplomatically-focused rights enforceable by a private right of petition. Indeed, it would make little practical sense for § 2241 to have done so, since we would have thereby imposed on the United States a

mechanism of enforceability that might not find an analogue in any other nation. This is not to say, of course, that the Geneva Convention is meaningless. Rather, its values are vindicated by diplomatic means and reciprocity, as specifically contemplated by Article 132. There is a powerful and self-regulating national interest in observing the strictures of the Convention, because prisoners are taken by both sides of any conflict. This is the very essence of reciprocity and, as the drafters of the Convention apparently decided, the most appropriate basis for ensuring compliance. As the Court in *Eisentrager* observed about the predecessor to the current Geneva Convention, "the obvious scheme of the Agreement [is] that responsibility for observance and enforcement of these rights is upon political and military authorities." 339 U.S. at 789 n.14.

Even if Article 5 were somehow self-executing, there are questions about how it would apply to Hamdi's case. In particular, it is anything but clear that the "competent tribunal" which would determine Hamdi's status would be an Article III court. Every country has different tribunals, and there is no indication that the Geneva Convention was intended to impose a single adjudicatory paradigm upon its signatories. Moreover, Hamdi's argument begs the question of what kind of status determination is necessary under Article 5 and how extensive it should be. Hamdi and the amici make much of the distinction between lawful and unlawful combatants, noting correctly that lawful combatants are not subject to punishment for their participation in a conflict. But for the purposes of this case, it is a distinction without a difference, since the option to detain until the cessation of hostilities belongs to the executive in either case. It is true that unlawful combatants are entitled to a proceeding before a military tribunal

before they may be punished for the acts which render their belligerency unlawful. *Quirin,* 317 U.S. at 31. But they are also subject to mere detention in precisely the same way that lawful prisoners of war are. *Id.* The fact that Hamdi might be an unlawful combatant in no way means that the executive is required to inflict every consequence of that status on him. The Geneva Convention certainly does not require such treatment.

For all these reasons, we hold that there is no purely legal barrier to Hamdi's detention. We now turn our attention to the question of whether the August 16 order was proper on its own terms.

IV.

As we will discuss below, we conclude that Hamdi's petition fails as a matter of law. It follows that the government should not be compelled to produce the materials described in the district court's August 16 order.

We also note that the order, if enforced, would present formidable practical difficulties. The district court indicated that its production request might well be only an initial step in testing the factual basis of Hamdi's enemy combatant status. The court plainly did not preclude making further production demands upon the government, even suggesting that it might "bring Hamdi before [the court] to inquire about [his] statements."

Although the district court did not have "any doubts [that Hamdi] had a firearm" or that "he went to Afghanistan to be with the Taliban," the court ordered the government to submit to the court for in camera, ex parte review: (1) "[c]opies of all Hamdi's statements, and the

notes taken from any interviews with Hamdi, that relate to his reasons for going to Afghanistan, his activities while in Afghanistan, or his participation in the military forces of the Taliban or any other organization in that country"; (2) "[a] list of all the interrogators who have questioned Hamdi, including their names and addresses, and the dates of the interviews"; (3) "[c]opies of any statements by members of the Northern Alliance" regarding Hamdi's surrender; (4) "[a] list that includes the date of Hamdi's capture, and that gives all the dates and locations of his subsequent detention"; (5) "[t]he name and title of the individual within the United States Government who made the determination that Hamdi was an illegal enemy combatant"; (6) "[t]he name and title of the individual within the United States Government who made the decision to move Hamdi from Guantanamo Bay, Cuba to the Norfolk Naval Station"; and (7) "the screening criteria utilized to determine the status of Hamdi." The court's order allows the government to redact "intelligence matters" from its responses, but only to the extent that those intelligence matters are outside the scope of inquiry into Hamdi's legal status.

Hamdi argues vigorously that this order should be affirmed. Because of the alleged "breadth with which Respondents construe their authority to imprison American citizens whom they consider to be enemy combatants," Br. of the Petitioners/Appellees at 27, Hamdi argues we must allow the district court to subject the government's classification of him to a searching review. While the ordinary § 2241 proceeding naturally contemplates the prospect of factual development, *see* 28 U.S.C. §§ 2243, 2246, such an observation only begs the basic question in this case – whether further factual exploration would

bring an Article III court into conflict with the warmaking powers of Article I and II. Here, the specific interests asserted by the government flow directly from the warmaking powers and are intimately connected to them. Whatever the general force of these interests (which we discussed extensively above), they are most directly implicated by captures in a zone of active combat operations.

A review of the court's August 16 order reveals the risk of "stand[ing] the warmaking powers of Articles I and II on their heads," *Hamdi II,* 296 F.3d at 284. The district court, for example, ordered the government to produce all Hamdi's statements and notes from interviews. Yet it is precisely such statements, relating to a detainee's activities in Afghanistan, that may contain the most sensitive and the most valuable information for our forces in the field. The risk created by this order is that judicial involvement would proceed, increment by increment, into an area where the political branches have been assigned by law a preeminent role.

The district court further ordered the government to produce a list of all interrogators who have questioned Hamdi, including their names and addresses and the dates of the interviews, copies of any statements by members of the Northern Alliance regarding Hamdi's surrender, and a list that includes the date of Hamdi's capture and all the dates and locations of his subsequent detention. Once again, however, litigation cannot be the driving force in effectuating and recording wartime detentions. The military has been charged by Congress and the executive with winning a war, not prevailing in a possible court case. Complicating the matter even further is the fact that Hamdi was originally captured by Northern

Alliance forces, with whom American forces were generally allied. The district court's insistence that statements by Northern Alliance members be produced cannot help but place a strain on multilateral efforts during wartime. The court also expressed concern in its order that the Northern Alliance did not "identify the unit [to which Hamdi was affiliated]," "where or by whom [Hamdi] received weapons training or the nature and extent thereof," or "who commanded the unit or the type of garb or uniform Hamdi may have worn. . . ." In demanding such detail, the district court would have the United States military instruct not only its own personnel, but also its allies, on precise observations they must make and record during a battlefield capture.

Viewed in their totality, the implications of the district court's August 16 production order could not be more serious. The factual inquiry upon which Hamdi would lead us, if it did not entail disclosure of sensitive intelligence, might require an excavation of facts buried under the rubble of war. The cost of such an inquiry in terms of the efficiency and morale of American forces cannot be disregarded. Some of those with knowledge of Hamdi's detention may have been slain or injured in battle. Others might have to be diverted from active and ongoing military duties of their own. The logistical effort to acquire evidence from far away battle zones might be substantial. And these efforts would profoundly unsettle the constitutional balance.

For the foregoing reasons, the court's August 16 production request cannot stand.

V.

The question remains, however, whether Hamdi's petition must be remanded for further proceedings or dismissed.

Hamdi's American citizenship has entitled him to file a petition for a writ of habeas corpus in a civilian court to challenge his detention, including the military's determination that he is an "enemy combatant" subject to detention during the ongoing hostilities. Thus, as with all habeas actions, we begin by examining the precise allegations presented to us by the respective parties. In this case, there are two allegations that are crucial to our analysis. First, Hamdi's petition alleges that he was a resident of and seized in Afghanistan, a country in which hostilities were authorized and ongoing at the time of the seizure, but that his continued detention in this country without the full panoply of constitutional protections is unlawful. Second, the Government's response asserts that Hamdi is being detained pursuant to the Commander-in-Chief's Article II war powers and that the circumstances underlying Hamdi's detention, as reflected primarily in the Mobbs declaration, establish that Hamdi's detention is lawful.

Generally speaking, in order to fulfill our responsibilities under Article III to review a petitioner's allegation that he is being detained by American authorities in violation of the rights afforded him under the United States Constitution, we must first determine the source of the authority for the executive to detain the individual. Once the source of the authority is identified, we then look at the justification given to determine whether it constitutes a legitimate exercise of that authority.

A.

Here the government has identified the source of the authority to detain Hamdi as originating in Article II, Section 2 of the Constitution, wherein the President is given the war power. We have already emphasized that the standard of review of enemy combatant detentions must be a deferential one when the detainee was captured abroad in a zone of combat operations. The President "is best prepared to exercise the military judgment attending the capture of alleged combatants." *Hamdi II,* 296 F.3d at 283. Thus, in *Quirin,* the Supreme Court stated in no uncertain terms that detentions "ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger" should not "be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Quirin,* 317 U.S. at 25.

This deferential posture, however, only comes into play after we ascertain that the challenged decision is one legitimately made pursuant to the war powers. It does not preclude us from determining in the first instance whether the factual assertions set forth by the government would, if accurate, provide a legally valid basis for Hamdi's detention under that power. Otherwise, we would be deferring to a decision made without any inquiry into whether such deference is due. For these reasons, it is appropriate, upon a citizen's presentation of a habeas petition alleging that he is being unlawfully detained by his own government, to ask that the government provide the legal authority upon which it relies for that detention and the basic facts relied upon to support a legitimate exercise of that authority. Indeed, in this case, the government has

voluntarily submitted – and urged us to review – an affidavit from Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy, describing what the government contends were the circumstances leading to Hamdi's designation as an enemy combatant under Article II's war power.

The Mobbs affidavit consists of two pages and nine paragraphs in which Mobbs states that he was "substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them." In the affidavit, Mobbs avers that Hamdi entered Afghanistan in July or August of 2001 and affiliated with a Taliban military unit. Hamdi received weapons training from the Taliban and remained with his military unit until his surrender to Northern Alliance forces in late 2001. At the time of his capture, Hamdi was in possession of an AK-47 rifle. After his capture, Hamdi was transferred first from Konduz, Afghanistan to the prison in Mazar-e-Sharif, and then to a prison in Sheberghan, Afghanistan where he was questioned by a United States interrogation team. This interrogation team determined that Hamdi met "the criteria for enemy combatants over whom the United States was taking control." Hamdi was then transported to the U.S. short term detention facility in Kandahar, and then transferred again to Guantanamo Bay and eventually to the Norfolk Naval Brig. According to Mobbs, a subsequent interview with Hamdi confirmed the details of his capture and his status as an enemy combatant.

The district court approached the Mobbs declaration by examining it line by line, faulting it for not providing information about whether Hamdi had ever fired a weapon, the formal title of the Taliban military unit

Hamdi was with when he surrendered, the exact composition of the U.S. interrogation team that interviewed Hamdi in Sheberghan, and even the distinguishing characteristics between a Northern Alliance military unit and a Taliban military unit. Concluding that the factual allegations were insufficient to support the government's assertion of the power to detain Hamdi under the war power, the court then ordered the production of the numerous additional materials outlined previously. We think this inquiry went far beyond the acceptable scope of review.

To be sure, a capable attorney could challenge the hearsay nature of the Mobbs declaration and probe each and every paragraph for incompleteness or inconsistency, as the district court attempted to do. The court's approach, however, had a signal flaw. We are not here dealing with a defendant who has been indicted on criminal charges in the exercise of the executive's law enforcement powers. We are dealing with the executive's assertion of its power to detain under the war powers of Article II. *See Eisentrager,* 339 U.S. at 793 (Black, J., dissenting) ("[I]t is no 'crime' to be a soldier."); *cf. In re Winship,* 397 U.S. 358, 363 (1970) (explaining that elevated burden of proof applies in criminal cases because of consequences of conviction, including social stigma). To transfer the instinctive skepticism, so laudable in the defense of criminal charges, to the review of executive branch decisions premised on military determinations made in the field carries the inordinate risk of a constitutionally problematic intrusion into the most basic responsibilities of a coordinate branch.

The murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake. Yet these characteristics of warfare have been with us through

the centuries and have never been thought sufficient to justify active judicial supervision of combat operations overseas. To inquire, for example, whether Hamdi actually fired his weapon is to demand a clarity from battle that often is not there. The district court, after reviewing the Mobbs affidavit, did not "have any doubts [Hamdi] had a firearm [or] any doubts he went to Afghanistan to be with the Taliban." To delve further into Hamdi's status and capture would require us to step so far out of our role as judges that we would abandon the distinctive deference that animates this area of law.

For these reasons, and because Hamdi was indisputably seized in an active combat zone abroad, we will not require the government to fill what the district court regarded as gaps in the Mobbs affidavit. The factual averments in the affidavit, if accurate, are sufficient to confirm that Hamdi's detention conforms with a legitimate exercise of the war powers given the executive by Article II, Section 2 of the Constitution and, as discussed elsewhere, that it is consistent with the Constitution and laws of Congress. *See Quirin,* 317 U.S. at 25. Asking the executive to provide more detailed factual assertions would be to wade further into the conduct of war than we consider appropriate and is unnecessary to a meaningful judicial review of this question.

B.

We turn then to the question of whether, because he is an American citizen currently detained on American soil by the military, Hamdi can be heard in an Article III court to rebut the factual assertions that were submitted to support the "enemy combatant" designation. We hold that

no evidentiary hearing or factual inquiry on our part is necessary or proper, because it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country and because any inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch.

In support of its contention that no further factual inquiry is appropriate, the government has argued that a "some evidence" standard should govern the adjudication of claims brought by habeas petitioners in areas where the executive has primary responsibility. That standard has indeed been employed in contexts less constitutionally sensitive than the present one, albeit in a procedural posture that renders those cases distinguishable. *See, e.g., INS v. St. Cyr,* 533 U.S. 289, 306 (2001) (describing historical practice under which, so long as "there was some evidence to support" a deportation order, habeas courts would not "review factual determinations made by the Executive"); *Eagles v. Samuels,* 329 U.S. 304, 312 (1946); *Fernandez v. Phillips,* 268 U.S. 311, 312 (1925). In each of these cases, the Court indicated that the role of the writ is not to correct "mere error" in the executive's exercise of a discretionary power, but rather to check the executive branch if it asserts a "power to act beyond the authority granted." *Eagles,* 329 U.S. at 311-12. Thus, the government asserts, the role of a habeas court is not to reconsider the executive's decision, but rather only to confirm that "there was *some* basis for the challenged executive determination." Br. for Respondents-Appellants at 29. Once that determination is made, the government further asserts, the detainee may not offer any rebuttal evidence and no further factual inquiry is allowed.

It is not necessary for us to decide whether the "some evidence" standard is the correct one to be applied in this case because we are persuaded for other reasons that a factual inquiry into the circumstances of Hamdi's capture would be inappropriate.

1.

As we have emphasized throughout these appeals, we cannot set aside executive decisions to detain enemy combatants "without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Quirin,* 317 U.S. at 25. We cannot stress too often the constitutional implications presented on the face of Hamdi's petition. The constitutional allocation of war powers affords the President extraordinarily broad authority as Commander in Chief and compels courts to assume a deferential posture in reviewing exercises of this authority. And, while the Constitution assigns courts the duty generally to review executive detentions that are alleged to be illegal, the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally.

Indeed, Article III courts are ill-positioned to police the military's distinction between those in the arena of combat who should be detained and those who should not. Any evaluation of the accuracy of the executive branch's determination that a person is an enemy combatant, for example, would require courts to consider, first, what activities the detainee was engaged in during the period leading up to his seizure and, second, whether those activities rendered him a combatant or not. The first question is factual and, were we called upon to delve into

it, would likely entail substantial efforts to acquire evidence from distant battle zones. *See Eisentrager,* 339 U.S. at 779. The second question may require fine judgments about whether a particular activity is linked to the war efforts of a hostile power – judgments the executive branch is most competent to make.

Hamdi's petition places him squarely within the zone of active combat and assures that he is indeed being held in accordance with the Constitution and Congressional authorization for use of military force in the wake of al Qaida's attack. *Quirin,* 317 U.S. at 25. Any effort to ascertain the facts concerning the petitioner's conduct while amongst the nation's enemies would entail an unacceptable risk of obstructing war efforts authorized by Congress and undertaken by the executive branch.

2.

Hamdi contends that, although international law and the laws of this country might generally allow for the detention of an individual captured on the battlefield, these laws must vary in his case because he is an American citizen now detained on American soil. As an American citizen, Hamdi would be entitled to the due process protections normally found in the criminal justice system, including the right to meet with counsel, if he had been charged with a crime. But as we have previously pointed out, Hamdi has not been charged with any crime. He is being held as an enemy combatant pursuant to the well-established laws and customs of war. Hamdi's citizenship rightfully entitles him to file this petition to challenge his detention, but the fact that he is a citizen does not affect the legality of his detention as an enemy combatant.

Indeed, this same issue arose in *Quirin*. In that case, petitioners were German agents who, after the declaration of war between the United States and the German Reich, were trained at a German sabotage school where they "were instructed in the use of explosives and in methods of secret writing." *Quirin*, 317 U.S. at 21. The petitioners then journeyed by submarine to the beaches of New York and Florida, carrying large quantities of explosives and other sabotage devices. All of them were apprehended by FBI agents, who subsequently learned of their mission to destroy war industries and facilities in the United States. All of the petitioners were born in Germany but had lived in the United States at some point. One petitioner claimed American citizenship by virtue of the naturalization of his parents during his youth. The Court, however, did not need to determine his citizenship because it held that the due process guarantees of the Fifth and Sixth Amendments were inapplicable in any event. It noted that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful." *Id.* at 37. The petitioner who alleged American citizenship was treated identically to the other German saboteurs.

The *Quirin* principle applies here. One who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such. The privilege of citizenship entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches. At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not

entitle him to a searching review of the factual determinations underlying his seizure there.

3.

Similarly, we reject Hamdi's argument that even if his initial detention in Afghanistan was lawful, his continuing detention on American soil is not. Specifically, Hamdi contends that his petition does not implicate military concerns because "the underlying claims in this case are designed to test the legality of Hamdi's imprisonment in a naval brig in Norfolk, Virginia, not a military determination made overseas on the basis of caution rather than accuracy." Br. of the Petitioners/Appellees at 44. But the fact that Hamdi is presently being detained in the United States – as opposed to somewhere overseas – does not affect the legal implications of his status as an enemy combatant. For the same reason that courts are ill-positioned to review the military's distinction between those who should or should not be detained in an arena of combat, courts are not in the position to overturn the military's decision to detain those persons in one location or another. It is not clear why the United States should be precluded from exercising its discretion to move a detainee to a site within this country, nor do we see what purpose would be served by second guessing the military's decision with respect to the locus of detention.

4.

To conclude, we hold that, despite his status as an American citizen currently detained on American soil, Hamdi is not entitled to challenge the facts presented in the Mobbs declaration. Where, as here, a habeas petitioner

has been designated an enemy combatant and it is undisputed that he was captured in an zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner's detention. Because these circumstances are present here, Hamdi is not entitled to habeas relief on this basis.

C.

Finally, we address Hamdi's contention that even if his detention was at one time lawful, it is no longer so because the relevant hostilities have reached an end. In his brief, Hamdi alleges that the government "confuses the international armed conflict that allegedly authorized Hamdi's detention in the first place with an on-going fight against individuals whom Respondents refuse to recognize as 'belligerents' under international law." *Id.* at 53-54. Whether the timing of a cessation of hostilities is justiciable is far from clear. *See Ludecke,* 335 U.S. at 169 ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled."). The executive branch is also in the best position to appraise the status of a conflict, and the cessation of hostilities would seem no less a matter of political competence than the initiation of them. *See United States v. The Three Friends,* 166 U.S. 1, 63 (1897) ("[I]t belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed."). In any case, we need not reach this issue here. The government notes that American troops

are still on the ground in Afghanistan, dismantling the terrorist infrastructure in the very country where Hamdi was captured and engaging in reconstruction efforts which may prove dangerous in their own right. Because under the most circumscribed definition of conflict hostilities have not yet reached their end, this argument is without merit.

VI.

It is important to emphasize that we are not placing our imprimatur upon a new day of executive detentions. We earlier rejected the summary embrace of "a sweeping proposition – namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi II,* 296 F.3d at 283. But, Hamdi is not "any American citizen alleged to be an enemy combatant" by the government; he is an American citizen captured and detained by American allied forces in a foreign theater of war during active hostilities and determined by the United States military to have been indeed allied with enemy forces.

Cases such as Hamdi's raise serious questions which the courts will continue to treat as such. The nation has fought since its founding for liberty without which security rings hollow and for security without which liberty cannot thrive. The judiciary was meant to respect the delicacy of the balance, and we have endeavored to do so.

The events of September 11 have left their indelible mark. It is not wrong even in the dry annals of judicial opinion to mourn those who lost their lives that terrible day. Yet we speak in the end not from sorrow or anger, but

from the conviction that separation of powers takes on special significance when the nation itself comes under attack. Hamdi's status as a citizen, as important as that is, cannot displace our constitutional order or the place of the courts within the Framer's scheme. Judicial review does not disappear during wartime, but the review of battlefield captures in overseas conflicts is a highly deferential one. That is why, for reasons stated, the judgment must be reversed and the petition dismissed. It is so ordered.

JUDGMENT

FILED: January 8, 2003

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 02-7338
CA-02-439-2

YASER ESAM HAMDI; ESAM FOUAD HAMDI, as next friend of Yaser Esam Hamdi

Petitioners-Appellees

v.

DONALD RUMSFELD; W. R. PAULETTE, Commander

Respondents-Appellants

[RUTH WEDGEWOOD; SAMUEL ESTREICHER; DOUGLAS W. KMIEC; DAVID B. RIVKIN, JR.; LEE A. CASEY; DARIN R. BARTRAM,]

Amici Curiae in Support of Appellants

[CENTER FOR CONSTITUTIONAL RIGHTS; 140 LAW PROFESSORS AND 19 INTERESTED ORGANIZATIONS; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; AMERICAN CIVIL LIBERTIES UNION; ACLU FOUNDATION OF VIRGINIA,]

Amici Curiae in support of Appellees

Appeal from the United States District Court for the Eastern District of Virginia at Norfolk

In accordance with the written opinion of this Court filed this day, the Court reverses the judgment of the District Court and remands this case for further proceedings consistent with this Court's opinion.

/s/ Patricia S. Connor
CLERK

337 F.3d 335

PUBLISHED

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Amici Curiae in support of Appellees

No. 02-7338

Filed: July 9, 2003

ORDER

Appellees filed a petition for rehearing and suggestion for rehearing en banc.

The panel voted to deny panel rehearing.

A member of the Court requested a poll on the petition for rehearing en banc, and a majority of the judges in active service voted to deny rehearing en banc. Judges Luttig, Motz, King, and Gregory voted to grant rehearing en banc. Chief Judge Wilkins, and Judges Widener, Wilkinson, Niemeyer, Williams, Michael, Traxler, and Shedd voted to deny rehearing en banc.

Judge Wilkinson filed an opinion, concurring in the denial of rehearing en banc. Judge Traxler filed an opinion, concurring in the denial of rehearing en banc. Judge Luttig filed an opinion, dissenting from the denial of rehearing en banc. Judge Motz filed an opinion, dissenting from the denial of rehearing en banc.

The Court denies the petition for rehearing and suggestion for rehearing en banc. The mandate shall issue forthwith.

Entered at the direction of Judge Wilkinson for the Court.

WILKINSON, Circuit Judge, concurring in the denial of rehearing en banc:

I concur in the denial of the rehearing en banc. The panel opinion written by Chief Judge Wilkins, Judge Traxler, and myself has already properly resolved this case. *See Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

I thus offer only these few comments in response to the dissent of my good colleague Judge Motz.

Hamdi is being held according to the time-honored laws and customs of war. There is nothing illegal about that. The option to detain those captured in a zone of armed combat for the duration of hostilities belongs indisputably to the Commander in Chief. Art. II, Sec. II. And the question is essentially whether the United States can capture and detain prisoners of war without subjecting the factual circumstances surrounding foreign battlefield seizures to extensive in-court review.[1] The answer to this is now – and always has been – yes. In giving prisoners of war the right to litigate their detentions in American courts, the dissent would install a more restrictive regime on the executive branch after September 11 than existed before. I regret that my colleague does not even quote the

[1] The government does not concede that Hamdi is a prisoner of war, but rather asserts that he is an unlawful combatant. For the purposes of this case, the distinction is irrelevant because the decision to detain until the cessation of hostilities belongs to the executive in either case. *See Hamdi*, 316 F.3d at 469.

The panel earlier expressed doubt that the timing of a cessation of hostilities was even justiciable. *Hamdi v. Rumsfeld*, 316 F.3d at 476 (quoting *Ludecke v. Watkins*, 335 U.S. 160, 169 (1948) ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.")). It would be an intrusive venture into international relations for an inferior federal court to declare a cessation of hostilities and order a combatant's release when an American military presence remained in the theater of combat and when the status of combatants, their terms of release, and the mutuality of exchanges may all remain subjects for negotiation and diplomacy. *See Ludecke*, 335 U.S. at 169; *The Three Friends*, 166 U.S. 1, 63 (1897); *The Prize Cases*, 67 U.S. 635, 670 (1862).

provisions of Article I and Article II which delegate the conduct of war to the coordinate branches of our government. For the course on which my dissenting colleague is embarked will trespass, increment by increment, upon those powers, to the detriment of the judiciary's own obligation to respect the proper limits and boundaries of its role.

To claim, as my colleague does here, that there was no meaningful judicial review of Hamdi's detention is incorrect. There was extensive review of every legal challenge to Hamdi's detention. The dissent wishes to proceed further and litigate precisely why petitioner was seized and whether the military capture can be justified. The conduct of war, however, involves innumerable discretionary decisions made by our armed forces in the field every day. Many of them have life or death consequences. To subject these discretionary decisions made in the course of foreign combat operations to the prospect of domestic litigation would be an unprecedented step. Doing so would ignore the fundamentals of Article I and II – namely that they entrust to our armed forces the capacity to make the necessary and traditional judgments attendant to armed warfare, and that among these judgments is the capture and detention of prisoners of war. *See The Prize Cases*, 67 U.S. 635, 670 (1862).

Hamdi's own filings make clear that he was seized in a zone of active combat operations. Hamdi's petition notes that "[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan." *See* Petition for Habeas Corpus, p. 2. In their traverse, petitioners state that the petition does not "implicate Respondents' initial detention of Petitioner Hamdi in Afghanistan." *See* Traverse and Response to Respondent's Motion to Dismiss, p. 2. And

outside the legal arena, petitioner Esam Fouad Hamdi, in a letter to Senator Patrick J. Leahy, stated that they were "not challenging the battlefield determination, decision to detain individuals in the theater of combat." *See* Letter to Senator Patrick J. Leahy, August 5, 2002. Even the district court, while ordering a more intrusive examination of the circumstances of Hamdi's capture, noted that "[p]etitioners concede that Hamdi's initial detention in a foreign land during a period of ongoing hostilities is not subject, for obvious reasons, to a due process challenge." *See* Order of August 16, 2002, p. 8.[2] Our review of the petition was undertaken in light of this undisputed fact.

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[2] The above submissions were repeatedly reinforced by Hamdi's counsel in open court. *See, e.g.*, "Hamdi[,] as far as I know, is the only [American citizen] out of all the detainees that were gathered up on the battlefield in Afghanistan." (Tr. of Oct. 28, 2000 oral argument at 37); Hamdi's counsel describing as "correct" the district judge's statement that "this man was in a fighting situation. . . . He was where the fight was." (Tr. of Aug. 13, 2002 district court proceedings at 70-71). Indeed, as Judge Traxler's thoughtful opinion indicates, the record is replete with admissions that Hamdi was captured in Afghanistan during hostilities, references that are fully consistent with the panel opinion and that make the locus of Hamdi's seizure susceptible to little more than metaphysical doubt. The fact that the panel may not have specifically quoted all such references in its opinion in no way implies that it rejected their validity.

The dissent makes the contention that Hamdi's father as next friend is incapable of making representations on Hamdi's behalf. *Post* at 62. But the cases my colleague cites in no way involved the constitutional principles implicated by a foreign battlefield capture. *See White v. Joyce*, 158 U.S. 128 (1895); *Kingsbury v. Buckner*, 134 U.S. 650 (1890); *Stolte v. Larkin*, 110 F.2d 226, 233 (8th Cir. 1940). In seeking to deny effect to the filings of the next friend in this case, the dissent's approach would abrogate yet once again the separation of powers by endowing those deemed enemy combatants with rights comparable to those enjoyed by ordinary civil or criminal litigants. And in decrying this

(Continued on following page)

With respect, the dissent's demand for further factual inquiries raises many more questions than it answers. The dissent notes vaguely that it wants a non-hearsay basis for petitioner's detention and that the Mobbs Declaration must be probed for every incompleteness or inconsistency. *Post* at 58. While the dissent appears to acknowledge that the district court production order went too far, its specific criticisms of the Mobbs Declaration suggest otherwise. This desire to have courts wade further and further into the supervision of armed warfare ignores the undertow of judicial process, the capacity of litigation to draw us into the review of military judgments step by step.

The dissent declines to acknowledge the perils in its path, and we are left to guess at how it would proceed. Opposing affidavits would not likely satisfy the dissent, for they would leave the court to weigh one protestation against the other with little means of doing so. *Ex parte*, *in camera* review would set disputes in motion over the scope of redaction and create a whole new set of secrecy issues surrounding Hamdi's case. *Ex parte*, *in camera* submissions would likely please no one – neither the government required to hand over potentially sensitive materials, nor Hamdi who would be denied the chance to contest an *ex parte* review of them, nor the public who would be left in the dark about the real basis for resolving Hamdi's case. My dissenting colleague also laments the absence of "first-hand knowledge of Hamdi's conduct or status in Afghanistan." *See post* at 65. The dissent is plainly unwilling to

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reasoning as "dizzyingly circular", *see post* at 62 n.1, the dissent again makes clear that nothing less than a full judicial exploration of the circumstances of petitioner's capture will suffice.

trust the judgment of those actually fighting the war that Hamdi was properly seized. What further steps should the judiciary then be prepared to take? What kind of hearings? What role for counsel? What kind of showings? What sort of witnesses? The district court struggled with these questions to ill effect. *See Hamdi*, 316 F.3d at 470-71; *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002).

My colleague's desire for more and more information signals not the end of a constitutionally intrusive inquiry, but the beginning. To start down this road of litigating what Hamdi was actually doing among the enemy or to what extent he was aiding the enemy is to bump right up against the war powers of Articles I and II. Judges are ill equipped to serve as final and ultimate arbiters of the degree to which litigation should be permitted to burden foreign military operations. The ingredients essential to military success – its planning, tactics, and intelligence – are beyond our ken, and the courtroom is a poor vantage point for the breadth of comprehension that is required to conduct a military campaign on foreign soil.

Because I think it both unreasonable and unfair to expect either judges or attorneys to discard a lifetime of honed instinct, I suspect that in time, if the course of the dissent is followed, the norms of the criminal justice process would come to govern the review of battlefield detentions in federal court. The prospect of such extended litigation would operate to inhibit our armed forces in taking the steps they need to win a war. The specter of hindsight in the courtroom would haunt decision-making in the field. At a minimum, if rules are to be prescribed for litigating something as sensitive as the soundness of battlefield detentions in Article III courts, then the prescription should come from Congress or the Executive

– the branches of government charged by our Constitution with the conduct of foreign war. I cannot conceive of the courts on their own motion – without the considered input of the political branches – devising a set of procedures allowing prisoners of war to hold American commanders accountable in federal court. If any illustration of the difficulties and hazards of such a judicial enterprise were needed, the history of Hamdi's case should more than suffice.

My colleague also interprets a series of World War II-era Supreme Court cases as invitations for the judiciary to involve itself in an exacting review of decisions made on foreign battlefields. *Post* at 60-61. My colleague's overreading of these decisions misses their fundamental import: they are replete with warnings that the judiciary must stay its hand when reviewing an exercise of the Commander-in-Chief powers during wartime. *Ex parte Quirin*, for example, holds without reservation that detentions "ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger" should not "be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." 317 U.S. 1, 25 (1942). Likewise, *Johnson v. Eisentrager* emphasized that "[e]xecutive power over enemy aliens" – the enemy combatants at issue in that case – "undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security." 339 U.S. 763, 774 (1950); *see also id.* at 778-79 (detailing the crippling complications that would arise from allowing searching judicial review of the petitioners' detention). And *In re Yamashita* noted that the military tribunals challenged in that case were "not subject to

judicial review merely because they have made a wrong decision on disputed facts." 327 U.S. 1, 8 (1946). "Such great war powers may be abused, no doubt, but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined." *Ludecke v. Watkins*, 335 U.S. 160, 172 (1948). These cases are caution signals to the judiciary, not green lights.

I seriously doubt that any mistake was made in Hamdi's case. But the Supreme Court in *Ex parte Quirin*, *Johnson v. Eisentrager*, and *In re Yamashita* was fully aware that war was a messy business, that mistakes could be made, but that close judicial review was nonetheless costly and constitutionally proscribed. And the panel in this case did not seek to move further than the precise case before it. *See Hamdi*, 316 F.3d at 465. To compare this battlefield capture to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges. Moreover, the recharacterizations of the holding in the dissent are manifestly far afield. The panel did not suggest that its holding would apply to any part of the world where American troops might happen to be present. There is not the slightest resemblance of a foreign battlefield detention to the roundly and properly discredited mass arrest and detention of Japanese-Americans in California in *Korematsu*. These attempts to recharacterize the holding of the panel find no support in the opinion's text itself.

Finally, although both the panel opinion and the dissent have noted the evidentiary shortcomings of the Mobbs Declaration, there is a value to having the United

States state under oath its reasons for the detention of an American citizen, even one captured during the course of armed combat.[3] To go further, however, would be folly. It is precisely at the point of armed combat abroad that the government's detention interests in gathering vital intelligence, in preventing detainees from rejoining the enemy and in stemming the diversion of military resources abroad into litigation at home are at their zenith. It diminishes these interests to inquire whether the judiciary deems them "legitimate," "substantial," or "compelling," for they are grounded in the wording of Articles I and II themselves. The federal judiciary plays a vital role in securing our rights. But the other branches of government also play their part in securing the blessings of our liberty. In this case, the paramount right is that of the citizens of our country to have their democracy's most vital, life-or-death decisions made by those whom the Constitution charges with that task.

In sum, this petition was properly dismissed.

[3] My colleague Judge Luttig's dissent attempts to straddle the issue by taking sides with both parties. On the one hand, it asserts that "the panel found itself simply unwilling to allow petitioner Hamdi to challenge the facts supporting his designation by the Executive as an enemy combatant." *Post* at 42. On the other hand, it argues that it is likely that "the facts recited in Special Advisor Mobbs' affidavit, as to which there is not even hint of fabrication, are sufficient to satisfy the constitutionally appropriate standard." *Post* at 57. In all events, the panel had before it the straightforward situation where petitioners' filings repeatedly corroborated the government's assertions that the locus of Hamdi's capture was a zone of active combat operations abroad. Unsurprisingly, the panel addressed the case on the basis of what was before it.

TRAXLER, Circuit Judge, concurring in the denial of rehearing en banc:

In their dissents from the denial of rehearing, my colleagues have appreciated the nature and magnitude of the competing interests at stake here. However, because I believe that their opinions at times have unfairly and inaccurately characterized the panel opinion, I regrettably find myself drawn to offer a few comments in response.[1]

I.

Each of my dissenting colleagues argues that the panel erred in premising its decision on the "admission" that Yaser Esam Hamdi was captured within the boundaries of Afghanistan. Judge Luttig questions whether any such admission was made, at least in the petition, and Judge Luttig and Judge Motz both believe that any such admission should be ineffective because it was made by Hamdi's father, Esam Fouad Hamdi, acting as Yaser Esam Hamdi's "next friend," and not directly by Yaser Esam Hamdi.

A.

I begin with Judge Luttig's charge that the panel opinion "is unpersuasive, because of its exclusive reliance upon a mistaken characterization of the circumstances of Hamdi's seizure as 'undisputed'" because they were not, in

[1] Because Judge Wilkinson has already written eloquently, and primarily, in response to Judge Motz's dissent, I focus my comments chiefly on matters raised by Judge Luttig.

his view, "conceded in fact." As an initial premise, I would point out that the panel decision does not characterize *all* the circumstances of Hamdi's seizure as being undisputed. Rather, it characterizes *one* circumstance of Hamdi's seizure as undisputed – his presence in Afghanistan while active military operations were being waged by the United States military against the governing Taliban regime. Hamdi's reason for being in Afghanistan at the time he was seized and the question as to whether he was indeed actively engaged as an enemy to our forces and this country are very much in dispute. The government asserts that Hamdi was in Afghanistan bearing arms as a Taliban soldier when he was seized; Hamdi's father asserts that Hamdi was only temporarily residing in Afghanistan while engaged in relief work when he was apprehended. Thus, the panel opinion's observation is in reality limited to the simple fact that "Hamdi was captured in a zone of active combat in a foreign theater of conflict." *Hamdi*, 316 F.3d at 459.[2]

As to this more narrow point of disagreement, Judge Luttig correctly observes that the habeas petition does not *explicitly* state that "Hamdi was captured in a zone of active combat in a foreign theater of conflict." *Id.* However,

[2] *See also Hamdi*, 316 F.3d at 460 (noting that the petitioner "acknowledg[ed] that Hamdi *was seized in Afghanistan* during a time of active military hostilities") (emphasis added); *id.* at 461 (noting that it was "undisputed that Hamdi *was captured in Afghanistan* during a time of armed hostilities there") (emphasis added); *id.* at 474 (noting that "Hamdi's petition *places him* squarely within the zone of active combat") (emphasis added); *id.* at 476 (noting that "it is undisputed that [Hamdi] was captured in a zone of active combat operations").

from this single pleading omission, Judge Luttig inexplicably leaps to the conclusion that the remaining petition allegations are ambiguous on the question (or, worse, that we should ignore them) and, even more inexplicably, to the belief that when responding to a dissent to a denial for rehearing en banc, the panel has somehow forfeited a right to point to any other pleading or representation filed or otherwise made *by the petitioner* that supports the observation, unremarkable when made, that Hamdi was indeed in Afghanistan when captured.

First, the petition's failure to affirmatively state that Hamdi was captured in a foreign combat zone did not and still does not compel me to ignore the other allegations that are present, nor does it cause me to consider that the place of Hamdi's capture is a matter of dispute. As Judge Wilkinson has pointed out, the petition alleges that "[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan." J.A. 9.[3] Were this the only allegation made, I suppose I could speculate about whether Hamdi had traveled from his "reside[nce] in Afghanistan" to another country "when [and where he was] seized by the United States Government," but I need not do so. *Id.* Significantly, the one statement quoted above is not the only allegation made; the petition provides a great deal more information than that. It avers that, following the terrorist attacks on September 11, 2001, "the United States initiated military action against the Taliban

[3] According to later representations made by his father, Hamdi left "Saudi Arabia for Pakistan and then Afghanistan on July 15, 2001 to do relief work in those countries," and became "trapped in Afghanistan once the military campaign began." J.A. 153.

Government in Afghanistan," and that, "in the course of the military campaign, . . . , the United States provided military assistance to the Northern Alliance." J.A. 10. As a result of this military assistance in Afghanistan, the petition states that

> the United States obtained access to individuals held by various factions of the Northern Alliance. On information and belief, Mr. Hamdi was captured or transferred into the custody of the United States in the Fall of 2001.

J.A. 10. It goes on to allege that "[o]n or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba," and that on or about that same date, "the United States military transferred Yaser Esam Hamdi to Camp X-Ray, Guantanamo Bay." J.A. 11.

When we authored the panel opinion, I did not consider these petition allegations to be ambiguous, nor do I today. A plain reading of the submission to us made clear that Esam Fouad Hamdi, as next friend to Yaser Esam Hamdi and as his father, based his claims in large part on the fact that Yaser was seized in Afghanistan in the course of the United States military operations within that country. His contention was that the United States military should release Yaser because he was not in Afghanistan to fight us or our allies and, therefore, was not *properly* being held as an "enemy combatant" by our military forces.

There was not then and there is not now any reason to be troubled by the lack of an *explicit* allegation in the petition that Hamdi was seized in a zone of active combat

in a foreign theater of conflict, because any possible question about whether the petition was incomplete or uncertain in its intent to allege that Hamdi was actually one of the prisoners captured and detained in Afghanistan would have been eliminated by Hamdi's Traverse and Response to the government's motion to dismiss, in which the petitioner engages in his own characterization of the substance of the factual allegations and the claims contained within the petition.

There, the petitioner unequivocally represents that the "claim [does not] implicate Respondents' initial detention of Petitioner Hamdi *in Afghanistan*," but "challenges only his current indefinite imprisonment in the United States Naval Brig in Norfolk, Virginia" and that, because petitioner did not contest the initial detention of Hamdi in Afghanistan, "Hamdi's claims have no practical consequences for the conduct of the military overseas." J.A. 64-65.[4] I do not see how the petitioner could be any clearer. He acknowledged that "[a]ccording to *both* the Petition *and* the Mobbs Declaration, Petitioner Hamdi was

[4] We have also been challenged for our alleged "altered and paraphrased rendition" of the petition's allegation concerning the location of Hamdi's seizure. We did interpret the petition as alleging that "'Hamdi was captured or transferred into the custody of the United States in the Fall of 2001' *in Afghanistan.*" *Hamdi*, 316 F.3d at 460 (emphasis added); *see* J.A. 10. But, even if we assume that the petition was ambiguous on this point, we did not "suppl[y] a geographical location of [Hamdi's] seizure and detention" nor "imput[e] a representation as to this location to the next friend," as charged by Judge Luttig; the next friend supplied the geographical location. Any ambiguity as to whether Hamdi was captured or transferred to the United States military in Afghanistan was likewise cleared up by the next friend's own characterization of his claim.

captured by the Northern Alliance and transferred into the custody of the United States in the Fall of 2001 or late 2001," J.A. 67 (emphasis added), represented that "[i]n January 2002, Respondents transported Petitioner Hamdi from Afghanistan to Guantanamo Bay, Cuba," J.A. 69, and complained that Hamdi was being punished by his "isolat[ion] from others similarly situated in Afghanistan and Guantanamo Bay, Cuba." J.A. 71.[5]

Additionally, as Judge Motz has observed in her dissent, we had been presented in the Joint Appendix with a letter written by Hamdi's father to United States Senator Patrick Leahy (which *petitioner* had submitted to the district court). In the letter, Hamdi's father stated that Yaser had "left our home in Saudi Arabia for Pakistan and

[5] Consistent arguments were also made to this court. For example, Hamdi argued that no deference was due the Respondents because, *inter alia*, "Hamdi's claims do not challenge the conduct of foreign policy, military decision-making, or even the propriety of his initial detention in Afghanistan," but instead challenge "the legality of his indefinite detention in a Norfolk naval brig without due process." Appellees' Brief at 27. Later, it was again represented that "Hamdi's claims do not require review of Respondents' prosecution of the war effort. As noted earlier, Hamdi's claims do not seek judicial review of the Executive Branch's conduct overseas." Appellees' Brief at 40. At yet another point, Hamdi argued that the "Respondents [had] mischaracteriz[ed] Hamdi's claims as an effort to 'second-guess[ ] the military determination' of his enemy combatant status," representing that "[o]n the contrary, the underlying claims in this case are designed to test the legality of Hamdi's imprisonment in a naval brig in Norfolk, Virginia, not a military determination made overseas. . . ." Appellees' Brief at 44. And, during oral argument, Hamdi again clarified that he was *not* challenging the legality of his initial seizure and detention *in Afghanistan* as an enemy combatant, but rather was only asserting that as one moves away from a foreign battlefield to the United States where civil courts are open and functioning, the deference due to the military's battlefield decision decreases.

then Afghanistan on July 15, 2001 to do relief work in those countries," "was trapped in Afghanistan once the military campaign began," and "was caught up in a local dragnet of non-Afghans in Mazar-e-Sharif in Afghanistan in November 2001" along with John Walker Lindh. J.A. 153. He was then "kept in [an] Afghanistan jail for 2-3 months prior to being moved to Guantanamo Bay where he stayed for 2 months before they confirmed that he [was] an American citizen, then they moved him to the Norfolk jail." J.A. 154. At no time was it ever hypothesized that Hamdi might not have been in Afghanistan when he was seized. Indeed, it was affirmatively represented that Hamdi was "caught at the same time Mr. John Walker Lindh was caught" in Afghanistan, but that he was "not [being] treated the same way," and was not properly determined to be "an enemy combatant." J.A. 154.[6]

In keeping with affirmative representations made to the court, at no time did anyone on either side of this controversy aver or allege that Hamdi was anywhere other than Afghanistan when he was captured or detained by the Northern Alliance or when he was turned over to the United States military. Judge Luttig has not pointed to a single contrary allegation. Nor did Hamdi's most capable counsel "gratuitously or foolishly concede that his seizure occurred in a foreign zone of combat," as Judge Luttig might have us believe. The case has at all times been litigated by counsel based on the consistent position of Hamdi's father that his son was in Afghanistan and was

[6] *See United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002); *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002); *United States v. Lindh*, 198 F. Supp. 2d 739 (E.D. Va. 2002).

captured there by our military, but that he was not there as an enemy combatant. Even in his petition for rehearing and rehearing en banc, Esam Hamdi did not assert that Yaser was somewhere other than in Afghanistan when seized; on the contrary, the petition *affirmatively acknowledges* that Hamdi's presence in Afghanistan is indeed an "undisputed" fact. The petition seeks a remand in order to allow Yaser Hamdi the opportunity to meet with counsel and contradict the government's assertion that he *was in a zone of combat operations* within the country of Afghanistan. Again, the petition seeks to litigate the factual question of *why* Hamdi was in Afghanistan when he was seized and, more precisely, whether he was actively engaged as an enemy to our forces, not *whether* he was in Afghanistan during wartime.

I cannot base a decision in so momentous a case on the theoretical possibility that the general allegations in the petition – that the United States obtained access to Hamdi and other prisoners in the custody of the Northern Alliance in Afghanistan and transferred these prisoners "captured in Afghanistan" to Guantanamo Bay – are wrong and do not apply to Hamdi's situation. Indeed, it would be ludicrous for us to somehow presume that they were not intended to be believed. Nor do I know of any precedent that would prompt us here to ignore the factual representations made by the petitioner and counsel in support of the petition. Because the government moved to dismiss the petition, I have assumed the factual allegations of the petition to be true and, for that matter, have accepted the petitioner's in-court representations regarding how they were intended to be interpreted. I am unfamiliar with any principle that would require us to assume that the factual allegations and in-court representations

made by the petitioner *and* the government are false, and none has been cited to me. Indeed, it would seem inappropriate for us to impute such strange intentions to Hamdi's father and his counsel. *Cf. S. Cross Overseas Agencies v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 428 n.8 (3d Cir. 1999) (employing a "reasonable reading of the complaint" to supply an allegation not expressly made by the plaintiffs).

Petitioner's position has remained quite constant throughout this appeal – that, because Hamdi is an American citizen by birth, he was entitled to meet with appointed counsel in order to contest the factual basis underlying the military's designation of him as an enemy combatant, as opposed to a peaceful resident, in Afghanistan – *once he was removed from the battlefield.* We found this position untenable, holding (for a great many reasons which I need not reiterate here) that when an American citizen is captured in an enemy country where we are engaged in active hostilities, we will require no more legal justification than what the government voluntarily provided to us in this case. I am still of the belief that this is the proper and legal course of analysis. And I reject, with little hesitation, this bemusing attempt to rewrite the case history and the substance of the habeas claim placed before us.

B.

I likewise disagree with Judge Luttig's belief, shared by Judge Motz, that Hamdi's capture in Afghanistan is not "susceptible to concession in law because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances." I am also cited to no

authority for the proposition that we should ignore or disbelieve the petitioner's allegations that Hamdi was taken into military custody in Afghanistan during the combat operations being waged there at the time (whether made expressly in the petition, by implication from its allegations, or by virtue of the petitioner's representations as to the intended meaning of the allegations) merely because the allegations were not personally written by Yaser Hamdi.

Indeed, a next friend does have the power to admit facts on behalf of the real party in interest, subject to the supervision of the court. *See Hall v. Hague*, 34 F.R.D. 449, 450 (D. Md. 1964). Were it otherwise, a next friend might be compelled to contest every fact which might be relevant, thereby creating unnecessary trouble and expense for the parties and the court. *See id.* at 449-50. Or, the mere filing of a next friend petition challenging civil disabilities might compel the lifting of such disabilities so that the real party in interest might participate fully in the litigation. The latter possibility is particularly ominous in a case such as this, as it would enable an alleged enemy combatant to disrupt, with no showing whatsoever, safeguards that the Executive has determined are necessary to protect vital national security interests.[7] In sum, I do not

[7] The cases cited by Judge Motz do not compel a contrary conclusion. *See White v. Miller*, 158 U.S. 128, 146 (1895); *Kingsbury v. Buckner*, 134 U.S. 650, 680 (1890); *Stolte v. Larkin*, 110 F.2d 226, 233 (8th Cir. 1940). The cases do not translate to a holding that the court, as opposed to the next friend, is charged with the duty to rewrite a claim brought by a next friend on behalf of a military detainee so as to assure its survival. Here, there is no reason to believe that rights are being bargained away or that a factual mistake is being made. There is surely no doubt as to the nature of the claim before us.

believe the panel erred in construing the petition to admit that Hamdi was captured in Afghanistan and in giving effect to that admission.

C.

This brings me, regrettably, to Judge Luttig's accusation that Judge Wilkinson and I have "attempt[ed] to save the panel opinion by marshaling for the first time today additional support, beyond that relied upon by the panel, for the panel's conclusion that it has been conceded that Hamdi was seized in a foreign combat zone." In a series of charges, Judge Luttig complains that Judge Wilkinson's concurrence "makes reference not only to the next friend petition upon which the panel solely relied, . . . but also to the new materials cited by the government in its response to the petition for rehearing in support of the court's conclusion that the location of seizure has been conceded, [including] Petitioner's Traverse and Response to Respondent's Motion to Dismiss filed in the district court. . . .", charges that this is but another example of "the trend in our court to attempt 'to add to, subtract from, or recharacterize the facts recited and relied upon in a challenged panel opinion,'" and presumes that our reliance upon petitioner's representations made about his petition is but an improper attempt to "shore up" our joint panel opinion because the panel now "senses . . . analytical softness of its opinion."

First, I can state without hesitation that I have no "sense" that our decision is analytically soft at all. On the contrary, the dissent's failure to point to a single allegation or statement in the record of this case that creates a dispute as to where Hamdi was when he was seized or

detained by our allies or our own military forces should end the discussion.

Second, Judge Luttig appears to have forgotten his characterization of our panel opinion as a "challenged panel opinion," albeit *challenged* in the form of the dissents written by Judge Luttig and Judge Motz to the full court's vote *not* to rehear the case en banc. Judge Luttig's criticism appears to be premised upon a belief that when panel members write in response to a dissent to a denial of rehearing en banc, it is improper for them to refer to anything in the original record which was not specifically referenced in the panel decision, as this would amount to "supply[ing] . . . important new facts or reasoning" not susceptible to appellate review. Such "additional support," Judge Luttig asserts, became "irrelevan[t] as a matter of law given that they were not relied upon in the panel opinion."

Obviously, any response by a panel, unanimous at the time the decision was rendered, to a dissent from a denial of rehearing en banc might be construed as an act of bolstering or "shor[ing] up" the published opinion in some sense. Otherwise, there would be nothing to say. Yet, I find no reason to remain silent when our opinion is being misinterpreted. I am confident that neither Judge Wilkinson nor I have informally "modif[ied]" the panel decision which we, along with Judge Wilkins, so painstakingly authored together. It is not my opinion-writing practice to recite every source of information contained within a joint appendix, nor every source directly relied upon in arguments. Indeed, there is rarely, if ever, a need to clutter an opinion with record support for uncontroversial statements that the parties have not contested in their pleadings, responses, briefs, or arguments.

In any event, I see no need to modify the panel opinion because we have pointed to no "important new facts or reasoning." We observed in the panel opinion that the habeas petition before us for disposition placed Hamdi in an enemy country when he was seized and detained by our military forces as an enemy combatant. In response to Judge Luttig's charge that the language of the petition does *not* place Hamdi in Afghanistan at the point of seizure, Judge Wilkinson and I have only gone so far as to point out that any question as to whether we have properly characterized the claims can be laid to rest by petitioner's own characterization of those allegations. Neither of us has pointed to anything that has not at all times been a part of the record and entirely consistent with the petition's allegations outlined above.[8]

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[8] For this reason, I also think it misleading to characterize the Traverse and Leahy letter as "new materials cited by the government in response to the petition for rehearing in support of the court's conclusion that the location of seizure has been conceded." These materials have been in the district court record and in the Joint Appendix since the inception of the appeal, and have been referred to by the parties throughout this litigation. There is nothing "new" about them.

With specific regard to Esam Hamdi's letter to Senator Leahy, we are additionally confronted by Judge Motz's view that it was improperly "ignored" by us and Judge Luttig's belief that it should have been ignored because it is "obviously irrelevant" to the issue. We considered everything submitted by the parties in the Joint Appendix and all of the arguments when authoring our joint opinion. We did not ignore the Leahy letter or find it to be "obviously irrelevant." The letter was presented to the district court by Hamdi's counsel, along with several other documents. The panel did not expressly cite to the letter to support the observation that Yaser Esam Hamdi was captured in a combat zone. But, like the Traverse (and other representations made below and at oral argument before this court), the Leahy letter was perfectly consistent with the unremarkable observation which we drew

(Continued on following page)

II.

I turn next to Judge Luttig and Judge Motz's shared belief that we have placed undue significance on the fact that Hamdi was seized in a foreign combat zone in evaluating the legal sufficiency of the Mobbs Declaration and, by doing so, have somehow paved the way for widespread deprivation of the individual constitutional rights of our citizens.

First, we have not pulled the significance of this simple fact from thin air. It is grounded in the time-honored rule of law in wartime – that all persons residing in an enemy country during hostilities are deemed to be enemies, regardless of nationality. *See Juragua Iron Co. v. United States*, 212 U.S. 297, 305-06 (1909). "[U]nder the recognized rules governing the conduct of a war between two nations, . . . all persons, whatever their nationality, who reside [] [in the enemy country] [are], pending such war, to be deemed enemies of the United States and all of its people." *Id.*; *see also Lamar v. Browne*, 92 U.S. 187, 194 (1875); *Young v. United States*, 97 U.S. 39, 60 (1877). This is not to say that all persons residing within the enemy country are *in fact* enemies, or specifically that Hamdi was necessarily an enemy combatant merely because he was in Afghanistan during a conflict between the United States and the Afghan government. But, significant consequences necessarily attached to Hamdi's presence in Afghanistan; his individual rights stood in tension with the Executive's

from the allegations of the petition before us and as they had been represented to us, *i.e.*, that Hamdi was indeed in Afghanistan when he was seized. It certainly did not raise any ambiguity in the petition concerning Hamdi's location when he was seized.

wartime powers under Article II. Consequently, the Judiciary became compelled, by the nature of war and by dint of the separation of powers we are required to safeguard and honor, to give deference to the Executive to determine who within a hostile country is friend and who is foe.[9]

Second, Judge Motz and Judge Luttig's collective fear that our recognition of this time-honored principle might result in innocent journalists or unwitting tourists falling victim to unreviewable military detentions anywhere in the world can be easily laid to rest. Judge Motz, for example, asserts that our decision would allow "any of the 'embedded' American journalists covering the war in Iraq or any member of a humanitarian organization working in Afghanistan, [to] be imprisoned indefinitely" by our military, that "any American citizen seized in a part of the world where American troops are present – *e.g.*, the former Yugoslavia, the Philippines, or Korea – could be imprisoned indefinitely, merely by asserting that the area is a zone of active combat," and the even more extreme "fear that the panel may also have opened the door to the indefinite detention, without access to a lawyer or the courts, of any American citizen, *even one captured on*

[9] In his petition for rehearing and rehearing en banc, petitioner argued it could only be said to be undisputed that Hamdi was in a zone of active combat operations if the entire country of Afghanistan is such a zone at the time of capture. I have no problem with this view. The United States is in a sanctioned military operation designed to oust from power the governing regime of the country of Afghanistan. Just as we "are ill-positioned to police the military's distinction between those in the arena of combat who should be detained and those who should not," *Hamdi*, 316 F.3d at 474, we are ill-positioned to question the military's determination that any particular area of a country with whom we are at war is or is not an "active combat zone."

American soil, who the Executive designates an 'enemy combatant,' as long as the Executive asserts that the area in which the citizen was detained was an 'active combat zone,' and the detainee, deprived of access to courts and counsel, cannot dispute this fact." Judge Luttig also points to "[t]he embedded journalist or even the unwitting tourist" who "could be seized and detained in a foreign combat zone." And, he too claims that such a likelihood would be "far from infinitesimal where the theater is global, not circumscribed, and the engagement is an unconventional war against terrorists, not a conventional war against an identifiable nation state."

Although effective in stirring emotion, our colleagues' expressed fears are grounded in conclusions not reached or even predicted by the panel decision. Our decision does not speak to the issue of whether an "enemy combatant" may challenge the government's claim that the former Yugoslavia, the Philippines, or Korea is a zone of active military operations for purposes of the President's exercise of his Article II war powers. Rather, it addresses only the appropriate level of deference to be observed when the President exercised his power to detain an American citizen found within the boundaries of Afghanistan during our military efforts to overthrow its governing regime. Nor does it sanction indefinite detention, but rather contemplates detention for the duration of such hostilities.

In short, my colleagues' collective desire (albeit undertaken for much different reasons) to redefine the case before us has caused them to lose their focus on our holding. Afghanistan is an identifiable nation state and Hamdi was in a conventional war situation. Every resident within Afghanistan (including Hamdi as was explicitly alleged) was in law an enemy, until determined by the

Executive to be a friend. As Judge Wilkinson aptly observed, war is a messy business and mistakes can be made. American journalists and American tourists who venture into a country with whom we are at war without the approval of our military, or who fail to return to this country in time of war, necessarily expose themselves to many risks, including this one. But the circumstances of armed conflict against a foreign government in a foreign land require the deference we have shown the Executive in the making of military decisions.

III.

Despite their common criticism of our observation that Hamdi was captured in Afghanistan – and our belief that Hamdi's capture in Afghanistan guides our inquiry as to whether the Mobbs Declaration is sufficient to justify Hamdi's detention as an enemy combatant – our colleagues differ significantly in their opinions as to what kind of review is appropriate.

Judge Motz would hold that the Mobbs Declaration is *insufficient* to justify Hamdi's enemy combatant designation. And, although she disagrees that Hamdi's capture in Afghanistan is undisputed, in the end it really matters not to Judge Motz whether Hamdi was seized in Afghanistan. As Judge Wilkinson has noted, Judge Motz believes it proper for the Judiciary to litigate precisely why Yaser Hamdi was seized and whether the military capture can be justified regardless of where the seizure occurred. In short, Judge Motz "would require a greater showing from the Executive before [she] would permit an American citizen, held in the United States, to be imprisoned indefinitely, without ever being afforded the opportunity to

appear in court, contest the allegations against him, or consult with a lawyer." For the reasons expressed by Judge Wilkinson, I, of course, disagree.

Judge Luttig also contests our observation that Hamdi was present in Afghanistan when he was captured, but only pays lip service to Judge Motz's belief that we would have to give Hamdi access to counsel and a direct voice in an Article III court in order to determine his place of seizure. Unlike Judge Motz, it appears that Judge Luttig would in practice not give Hamdi a voice to either concede or dispute the place of seizure. Rather, Judge Luttig "believe[s]" he would adopt at most a "some evidence" standard as the appropriate level of deference due and "would likely conclude, as argued by the United States, that the facts recited in [the Mobbs' Declaration] are sufficient" to satisfy it. In other words, it seems Judge Luttig would hold that the Mobbs Declaration is *sufficient* to justify Hamdi's enemy combatant designation *regardless* of whether Hamdi admitted his presence in Afghanistan or flatly disputed it.

From this, I can only assume that Judge Luttig is really dissatisfied not because we have refused to give Hamdi a voice to raise a dispute as to his place of seizure, but because we evaluated the legal sufficiency of the government's response within the context of Hamdi's capture in Afghanistan. Thus, Judge Luttig charges, by "refus[ing] to rest decision on the proffer made by the President of the United States" and instead "rest[ing] decision on a putative concession by the detainee," we have "all but eviscerate[d] the President's Article II power to determine who are and who are not enemies of the United States during times of war." He accuses us of "disown[ing] [our] promise to the Executive to accord him

the substantial deference to which he is constitutionally entitled for his wartime decisions as to who constitute enemies of the United States," and predicts that our rule "will henceforth . . . cast the Judiciary as ultimate arbiter, in each and every instance, of whether the Executive has properly so classified a detainee." "[I]n every instance in which the [habeas] petitioner refrains from affirmative concession that he was seized in a foreign combat zone," Judge Luttig laments, "counsel must now be provided and judicial review had of the Executive's determination that one is an enemy combatant." Such hyperbole is not only unwarranted, it is plainly wrong.

Judge Luttig's first misrepresentation lies in his characterization of our opinion as holding that "more is 'unnecessary to a meaningful judicial review' of a challenge to an Executive's enemy combatant designation than a concession of seizure in a foreign combat zone." We have held no such thing, nor can such be fairly read from our opinion. The inaccuracy of this "paraphrased rendition" of our holding is readily apparent. The language quoted by Judge Luttig from the panel opinion is excised from the following passage from our opinion which follows an extensive discussion of the contents of the Mobbs Declaration and the practical problems of active judicial supervision of combat operations overseas:

> [B]ecause Hamdi was indisputably seized in an active combat zone abroad, we will not require the government to fill what the district court regarded as gaps in the Mobbs affidavit. The factual averments in the affidavit, if accurate, are sufficient to confirm that Hamdi's detention conforms with a legitimate exercise of the war powers given the executive by Article II, Section 2 of the Constitution and . . . is consistent with the

> Constitution and laws of Congress. *Asking the executive to provide more detailed factual assertions* would be to wade further into the conduct of war than we consider appropriate and *is unnecessary to a meaningful judicial review* of this question.

Id. at 473 (emphasis added) (citations omitted). Obviously, we did not hold that Hamdi's concession of seizure in a foreign combat zone rendered further judicial inquiry into an enemy combatant designation unnecessary. For the constitutional and practical reasons extensively discussed in the opinion, we held that Hamdi's presence in a war zone when seized rendered judicial inquiry *beyond* the legal sufficiency of the government's response unnecessary to a meaningful judicial review.

Indeed, we expressed *no* opinion as to whether the Mobbs Declaration was more than sufficient or just enough to ensure meaningful judicial review of the Executive's detention of an American citizen in an enemy country as an enemy combatant. The submission of the Mobbs Declaration was not directed by the Judiciary. Rather, the government voluntarily opted to provide, under oath, a level of information it believed to be legally sufficient to justify detention of an American citizen captured during the course of armed conflict in a foreign theater of battle, and asked us to respect the balance of powers and accept it as sufficient to warrant dismissal of the petition before us. And, we did indeed accept the Executive's voluntary proffer as sufficient. We took care not to make grand pronouncements as to what we might do in a different case, and even went so far as to expressly discourage any propensity on the part of others to view our decision as moving beyond the set of circumstances before us. Judge

Luttig decries what he believes to be a "Pyrrhic victory" for the government, but it has lost nothing. Even if we assume that the government sought such a broad holding, the most that can be said is that they did not get all they wanted and must seek it elsewhere.

Judge Luttig's second misrepresentation comes in the form of the prediction that, as a result of our opinion, "in every instance in which the [habeas] petitioner refrains from affirmative concession that he was seized in a foreign combat zone," "counsel must now be provided and judicial review had of the Executive's determination that one is an enemy combatant." Our opinion says no such thing. We held that the Mobbs Declaration was sufficient to allow meaningful judicial review of Hamdi's detention because he was within a hostile country when captured. We did not predict what would constitute meaningful judicial review of the detention of an United States citizen in cases in which the place of seizure is unknown or alleged to be within a country with whom we are not actively at war. Although we left open the possibility that the place of seizure might require further factual inquiry depending upon what representations the government provided, we did not hold that extended judicial review of the Executive's determination *that one is an enemy combatant* would become appropriate merely because a dispute existed *as to the place of capture.* Nor for that matter, did we even hold that the Mobbs Declaration would have been insufficient had the place of capture been in dispute in this case. Our opinion dealt, as it should, with the precise situation before us.

IV.

Finally, while I fully recognize that we have not gone as far as Judge Luttig would have us go, I take umbrage at his charge that this panel, as a result of "decisional paralysis," has "retreated" from its constitutional duty to decide this case based upon the facts presented and, instead, has fabricated a fact to ease our task. Nothing could be further from the truth. The government makes no such charge, no doubt cognizant that, in accordance with time-honored principles of constitutional decision-making, we have gone no further than necessary to resolve the delicate balance of constitutional interests before us. *See Poe v. Ullman*, 367 U.S. 497, 503 (1961) ("The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of strictest necessity.") (quoting *Parker v. County of Los Angeles*, 338 U.S. 327, 333 (1947)); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'") (quoting *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Commissioners*, 113 U.S. 33, 39 (1885)); *id.* ("The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"). *Burton v. United States*, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."). Nor, for that matter, does the petitioner, who argues not that Yaser's presence in Afghanistan was a matter of dispute, but only that we should not as a legal matter rely upon the allegations of the petition and the representations of the petitioner for the premise that Yaser was in an active combat zone within that country.

Nor is it fair to say that we "retreated to ground that . . . neither party attempted to defend." The government has recognized the significance of the place of capture from the outset of this case, arguing to us that "[t]he military determination at issue in this case – the decision to detain someone who was armed with an assault rifle when he surrendered *in a combat zone* as part of an enemy unit – directly implicates the national defense, not to mention the safety of American soldiers still stationed *in the zone of conflict*, and falls at the heart of the military's ability to conduct war." Respondents' Brief at 27. So has the petitioner, who has repeatedly disclaimed any intent to challenge a battlefield seizure in Afghanistan, but only Hamdi's current detention in the United States.

This case was presented to us on appeal from the district court's order finding that the Mobbs Declaration was insufficient to allow meaningful judicial review of Hamdi's classification as an enemy combatant. We held that the Mobbs Declaration provided by the government in response to the habeas petition was sufficient to uphold Hamdi's detention as an enemy combatant under the President's wartime powers. We have upheld the President's Article II power as Commander in Chief of the armed forces to defend this country from its enemies and to determine who are and who are not enemies of the United States within countries where we are engaged in active hostilities.

Yaser Hamdi's status as an American citizen entitles him to petition the Judiciary personally, or by next friend if he cannot for reasons of national security, for habeas relief and thereby to demand a response from the Executive as to why the detention is an acceptable utilization of his Article II powers. In the exercise of our Article III

powers, we review that response and may consider any legal arguments as to why the detention does not comport with a lawful exercise of war powers. Because Hamdi was within a country with whom we were fighting when he was seized, principles of separation of powers and practicalities of armed conflict dictate that we defer to the Executive's determination as to who is foe and who is not. Hamdi may test the legal basis for his detention. But, beyond that, Hamdi may be held, not indefinitely, but for the duration of active hostilities just like other non-citizen detainees captured in an enemy country by our military forces making a battlefield determination that the person detained was there to take up arms against our soldiers. And, in the holding most overlooked but most directly applicable to the claim as it was filed and argued before us, Hamdi's transfer by the military from the enemy country to Guantanamo Bay and then to the United States did not result in a greater right to challenge his designation.

In the end, Judge Luttig complains not because we accepted the Mobbs Declaration as sufficient and, thereby, granted the President the deference he sought from us. Rather, he complains because we have not forecast a similar level of deference in other contexts by adopting a global standard of review for all Executive detentions undertaken in the "war against terror." But, in order to reach this broader holding, he must attempt to find fault with our observation that Hamdi was in Afghanistan when seized, and he must characterize, however inaccurately, our opinion as resting *solely* upon that observation.

The impropriety of reaching beyond this case to decide another is, in my view, quite obvious. Judge Luttig opines that he would probably adopt the "some evidence"

standard advanced by the government and hold that the Mobbs Declaration would be sufficient even in the face of a factual dispute as to whether Hamdi was in Afghanistan. That question, however, does not merely raise a single difficult issue, as posited by Judge Luttig, as to what the global standard should be for this and other cases. Rather, it raises many difficult issues related to the President's Article II wartime powers and how they will ultimately be interpreted in an age of terror. And, no matter how interesting such questions may be, they are simply not before us. We are not dealing with the President's designation of Hamdi as an enemy combatant because he is a terrorist in the "war against terror" declared after the tragic events of September 11, 2001. Had Hamdi's petition been grounded in an allegation that he was seized in France under the auspices of the "war against terror," and had the military agreed to that allegation and designated him an enemy combatant, then we would have a much different case. Had Hamdi's petition been grounded in an allegation that he was seized in the United States under the auspices of the "war against terror," and the government agreed, then we would have a case not unlike *Padilla v. Bush*.[10] In both hypothetical situations, we might well be called upon to weigh other important national security interests. Whereas we would not likely face the dilemma of pulling military commanders out of the theater of war to testify in a court of law, for example, we would likely encounter such issues as whether France or the United States is a "zone of active military operations" and, if not, whether such

[10] *See Padilla v. Bush*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003); *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

seizures in a noncombat country can be a valid exercise of the Executive's Article II war power.

I need express no opinion on such issues because they are not before us. As the government's response to the petition makes clear, we are dealing with the President's designation of Hamdi as an enemy combatant in the war against Afghanistan with the stated goal of ousting the Taliban regime in order to end its support for Al Qaida and other terrorist networks. The conflict in Afghanistan is certainly related to the global conflict referred to as the "war against terror," but it is unquestionably a military conflict that falls quite neatly within our historical concepts of war. The questions Judge Luttig wishes to address might include some of the more novel, complex, and interesting ones a court could be called upon to contemplate, but no matter how much we might like to deal with them, they are not before us. We should not reach beyond this case to decide them.

LUTTIG, Circuit Judge, dissenting from denial of rehearing en banc:

As should be true under a rule of law, the reasoning underlying our resolution of the important issue presented by this appeal has implications beyond the particular dispute before us. In this instance, those implications are for no less commanding constitutional interests than the President's power to conduct war and the right of our citizens to be free from governmental restraint except upon lawful justification.

As my colleagues have recognized, the panel's opinion resolving the important issue presented by this suit is unpersuasive, because of its exclusive reliance upon a mistaken characterization of the circumstances of Hamdi's

seizure as "undisputed," when those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances. That the panel opinion is unpersuasive is borne out by no less significant a fact than that the panel itself, as evidenced by the two separate concurrences today, cannot even now agree as to either the proper interpretation or defense of its opinion.

Additionally, beyond the opinion's unpersuasiveness, its refusal to rest decision on the proffer made by the President of the United States, and its insistence instead upon resting decision on a putative concession by the detainee, has yielded reasoning that all but eviscerates the President's Article II power to determine who are and who are not enemies of the United States during times of war.

Because of the facial unpersuasiveness of the court's opinion, and because the opinion of law that resolves the issue raised in this appeal is of even greater constitutional importance than the result reached by that opinion, I would grant the requested rehearing *en banc*. I believe that the significance of the issue that has been presented calls for an opinion from this court that directly addresses that issue and resolves it unambiguously and convincingly (however broadly or narrowly), based upon the facts as they appear in the record and the arguments as they have been well made by the parties.

I.

On the central question presented in this case, it is evident that the panel found itself simply unwilling to allow petitioner Hamdi to challenge the facts supporting

his designation by the Executive as an enemy combatant, under any standard of review urged by those who appeared on behalf of Hamdi. However, the panel was equally unwilling either to adopt the "some evidence" standard and accept as sufficient under that standard the facts offered by the government as justification for Hamdi's seizure or to hold that the Judiciary is without all authority to review the President's designation of an individual as an enemy combatant, as alternatively urged by the government. Faced with this decisional paralysis, the panel retreated to ground that not only neither party attempted to defend, but that is transparently indefensible – holding that Hamdi cannot challenge, and the court cannot question, the facts proffered by the government in support of Hamdi's particular seizure and detention as an enemy combatant, for the asserted reason that Hamdi has *conceded* that he was seized in a foreign combat zone.

A.

In resting its decision on this factually and legally untenable ground, the panel reneged on the promises it hastily made to the parties at the litigation's inception.

It promised the citizen seized by the government "meaningful judicial review" of his claim that he was not an enemy combatant, pointedly refusing to "embrac[e] a sweeping proposition – namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002) ("*Hamdi II*"). But it ultimately provided that citizen a review that actually entailed absolutely no judicial inquiry into the

facts on the basis of which the government designated that citizen as an enemy combatant.

One could hardly be faulted for wondering why, as the panel held, more is "unnecessary to a meaningful judicial review" of a challenge to an Executive's enemy combatant designation than a concession of seizure in a foreign combat zone. Under even an exceedingly deferential standard of review, such, though it is relevant to, would hardly seem dispositive of whether one has been legitimately classified as an enemy combatant. The embedded journalist or even the unwitting tourist could be seized and detained in a foreign combat zone. Indeed, the likelihood that such could occur is far from infinitesimal where the theater is global, not circumscribed, and the engagement is an unconventional war against terrorists, not a conventional war against an identifiable nation state. But surely we would not conclude that that journalist or tourist (who could be expected to readily admit to his seizure in the foreign combat zone) had received meaningful judicial review of his claim that he was not an enemy combatant, if that claim received no judicial scrutiny at all merely because he stipulated that he was seized in that foreign combat zone. It is undoubtedly for these reasons that the Executive neither designated Hamdi an enemy combatant on the basis of his mere seizure in a foreign combat zone nor defends its designation in this court on such basis.

But as the panel disowned its promise to the detainee to provide him meaningful judicial review, so also did it disown its promise to the Executive to accord him the substantial deference to which he is constitutionally entitled for his wartime decisions as to who constitute enemies of the United States. The panel promised the

Executive that the Judiciary would not sit in full review of his judgments as to who is an enemy combatant of the United States, but it adopted a rule that will henceforth do just that, cast the Judiciary as ultimate arbiter, in each and every instance, of whether the Executive has properly so classified a detainee.

Upon a moment's reflection, it is apparent that the rule of law that was fashioned by the panel professedly in the name of deference to the Executive, and that now binds us, is, in application, a rule of no deference at all. For counsel must now be provided and judicial review had of the Executive's determination that one is an enemy combatant in every instance in which the petitioner but refrains from affirmative concession that he was seized in a foreign combat zone. The Executive's undeniably important interests in the prohibition of access to detained enemy combatants for reasons of national security and in the conduct of war free from fear that it will be summoned to court to answer to the Judiciary for its enemy designations, thus, are uncomfortably protected by little more than the hope (vain after the court's opinion, if not before) that the habeas petitioner will gratuitously or foolishly concede that his seizure occurred in a foreign zone of combat.

That the government's victory is but thinly guised defeat could not be better confirmed than by the arguments that have already been made in opposition to, and in support of, the panel's opinion by the parties to this dispute. Thus, those appearing on behalf of Hamdi argue, to no surprise and in compelling understatement, that the panel fundamentally erred for the reason that, "it cannot fairly be stated that it is 'undisputed' that Hamdi was captured within a zone of active combat operations in a

foreign country" "[b]ecause Hamdi was denied the opportunity to meet with counsel, and was refused the opportunity to dispute the facts put forth by [the government] – including assertions as to where he was captured and what the circumstances were at the time." Appellee's Petition for Rehearing and Suggestion for Rehearing in Banc, at 12-13. The obvious remedy for this error being, they reasonably claim, a remand for further factual development on the issue, with allowance for participation by Hamdi himself.

And the government, as expected, rejoins that "the type of evidentiary proceeding that appellees seek would raise precisely the same problems concerning judicial oversight of military operations overseas that the panel properly concluded is not only unwise, but unauthorized under our constitutional scheme." Answer for Respondents-Appellants to Petition for Rehearing and Suggestion for Rehearing en Banc, at 11.

A more Pyrrhic victory would be hard to conceive.

In sum, then, because of its unwillingness to confront head-on the admittedly difficult issue presented by this appeal, decide upon the standard of review required by the Constitution, and resolve the case by application of that standard to the facts proffered in justification for the Executive's designation of Hamdi as an enemy combatant of the United States, the panel succeeded in securing *neither* the guarantees of the Bill of Rights nor the powers committed to the Executive by Article II of the Constitution.

B.

These breaches perhaps could be excused if the panel had divined an unassailable narrower ground for decision than that foreshadowed by either of its bold promises. However, its decision cannot be excused on this basis, because the ground upon which the panel rested its decision is anything but unassailable. *For it simply is not "undisputed" that Hamdi was seized in a foreign combat zone.*

For its repeated assertions that this circumstance is conceded, *see Hamdi v. Rumsfeld*, 316 F.3d 450, 459, 461, 465, 473, 475, 476 (4th Cir. 2003) ("*Hamdi III*"), the panel relied solely on the petition filed by Hamdi's father as next friend. *See id.* at 460; *id.* at 461 (stating that the Mobbs affidavit "confirms the material factual allegations in Hamdi's petition"); *id.* at 474 ("Hamdi's petition places him squarely within the zone of active combat and assures that he is indeed being held in accordance with the Constitution. . . ."). As the panel wrote,

> [i]n this case, there are two allegations that are crucial to our analysis. *First, Hamdi's petition alleges that he was a resident of and seized in Afghanistan* . . . . Second, the Government's response asserts that Hamdi is being detained pursuant to the Commander-in-Chief's Article II war powers and that the circumstances underlying Hamdi's detentions, as reflected primarily in the Mobbs declaration, establish that Hamdi's detention is lawful.

Id. at 471 (emphasis added). Thus, the panel opinion quite clearly rests on the petition alone for the court's conclusion that seizure in a combat zone was "undisputed."

But the next friend petition says no such thing as the panel held that it does. It states that, "[w]hen seized by the United States Government, Mr. Hamdi *resided* in Afghanistan." J.A. 9 (emphasis added). Of course, it is a *non sequitur* to conclude from the representation that Hamdi *resided* in Afghanistan at the time of his seizure, that he was also *seized* in a foreign zone of active combat. In the end, it is obvious that the panel simply missed the critical import of this distinction between residency on one hand, and seizure or capture on the other, even though it recognized – at least in passing – the distinction between the two. As it said, though incorrectly as to the latter, "Hamdi's petition alleges that he was a resident of *and* seized in Afghanistan. . . ." *Hamdi III*, 316 F.3d at 471 (emphasis added).

Insistence that the distinction be drawn between acknowledgment of residency and concession of seizure in a combat zone is not to be clever. I have no reason to believe that Hamdi was not in a combat zone at the time of his seizure, and, to the extent relevant, I believe that he was. But, as a court of law, we cannot impute a concession of this circumstance of seizure from an innocuous acknowledgment of residency in a country in which combat was underway. Such is not credible.

No more so can other statements that appear in the next friend petition and relied upon by the panel be fairly taken as concession that Hamdi was actually seized in a foreign combat zone, as opposed to acknowledgment merely that he was a resident of a country in which there was ongoing combat at the time of seizure. The panel recites that,

> [a]ccording to the petition, "[i]n the course of the military campaign, and as part of their effort to overthrow the Taliban, the United States provided military assistance to the Northern Alliance, a loosely-knit coalition of military groups opposed to the Taliban Government," and thereby "obtained access to individuals held by various factions of the Northern Alliance."

Hamdi III, 316 F.3d at 460. The panel apparently viewed the quoted petition passages similarly as conceding seizure in a foreign combat zone. But a careful reading of these passages reveals that neither is such a concession fairly inferable from them. Most obviously, neither passage says anything at all about *Hamdi*. But, additionally, even if they had, there is no reason to presume that every person who was held by the Northern Alliance (assuming, for the moment, that Hamdi falls within that class) was captured in Afghanistan during the course of combat operations. Of course, this may have been the case. But it also may not have been.

The final statement in the next friend petition that the panel quoted, and on which it seemingly relied, was at once materially abbreviated by the panel and materially supplemented. The materiality of both the omission and the addition is apparent when the actual quotation from the petition is read side-by-side with the panel's altered and paraphrased rendition of that quotation. The petition actually reads as follows:

> On information and belief, Mr. Hamdi was captured or transferred into the custody of the United States in the Fall of 2001.

J.A. 10. In its opinion, however, the panel relates the statement in this way:

> The petition further alleges that "Hamdi was captured or transferred into the custody of the United States in the Fall of 2001" *in Afghanistan*. . . .

Hamdi III, 316 F.3d at 460 (emphasis added). Thus, terribly significantly given that the panel's opinion rests on the "undisputed" nature of the circumstance, the panel supplies a geographical location of seizure and detention that the statement in the petition just does not contain, imputing a representation as to this location to the next friend. And though it should not be necessary to put a finer point on it than this, even had the petition statement actually contained the geographical location of seizure and detention that the panel thought, the statement would not support the conclusion that the situs of seizure was conceded. For, even with this significant alteration, the statement would only admit that Hamdi was *either* "captured *or* transferred into custody," not necessarily one as opposed to the other.

In fact, upon reading the petition, it is actually apparent that it scrupulously avoids any admission as to the precise geographical point of seizure, likely because such was unknown to Hamdi's father, who filed the petition. *See* J.A. 11 (Petition: "On or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba. . . . On or about January 11, 2002, the precise date unknown to Petitioners but known to Respondents, the United States military transferred Yaser Esam Hamdi to Camp X-Ray, Guantanamo Bay, where he was held until April 2002.").

Because the panel opinion relies *exclusively* upon the next friend petition for its conclusion that Hamdi was

conceded to have been seized in a foreign combat zone, and because none of the statements in that petition either concede or can be fairly read to concede seizure in such a location, the panel's opinion, which in turn rests exclusively upon such a concession, is unconvincing.

C.

Sensing the vulnerability of the panel's opinion, the concurrences in the denial of rehearing *en banc* (Judges Wilkinson and Traxler) attempt to save the panel opinion by marshaling for the first time today additional support, beyond that relied upon by the panel, for the panel's conclusion that it has been conceded that Hamdi was seized in a foreign combat zone. Thus, for example, Judge Wilkinson maintains, "Hamdi's own *filings* make clear that he was seized in a zone of active combat operations," *ante* at 17 (emphasis added), by which he makes reference not only to the next friend petition upon which the panel solely relied, *see, e.g.*, *Hamdi III*, 316 F.3d at 460; *id.* at 461 (stating that the Mobbs Declaration "confirms the material factual allegations in Hamdi's petition"); *id.* at 471 ("Hamdi's petition alleges that he was a resident of and seized in Afghanistan. . . ."); *id.* at 474 ("Hamdi's petition places him squarely within the zone of active combat. . . ."), but also to the new materials cited by the government in its response to the petition for rehearing, in support of the court's conclusion that the location of seizure has been conceded. In particular, excepting a letter that is admittedly "outside the legal arena" and thus obviously irrelevant, Judge Wilkinson cites to Petitioner's Traverse and Response to Respondent's Motion to Dismiss filed in the district court and a statement by the district court. *Ante* at 17.

I have previously expressed my concern about the trend in our court to attempt "to add to, subtract from, or recharacterize the facts recited and relied upon in a challenged panel opinion, or even to fine-tune, if not fundamentally reshape, the legal analysis undertaken by the original panel, *in the course of opinions respecting the denial of rehearing en banc.*" *Jones v. Buchanan*, 325 F.3d 520, 538-40 (4th Cir. 2003) (Luttig, J., dissenting) (citing cases). Without repeating in full the reasons for this concern here, such attempted modifications are unfair to the litigants, because the parties (and the public) are bound by the panel opinion as it was written and issued, and they may obtain further review only of the issued panel opinion, without regard to modifications suggested by a concurrence in denial of *en banc* rehearing. In other words, they are bound by the only opinion of law in the case, not by the hypothetical opinion represented by the combination of the original panel opinion and purported modifications made during proceedings appealing for *en banc* reconsideration. This is not to say that explanatory concurrences in denials of rehearing *en banc* should never be written by the author of the challenged opinion or by judges who joined in that opinion; it is only to say that when such an opinion would add significant factual or legal support for the judgment reached, the appropriate course is for the panel to modify its opinion formally so as to supply the important new facts or reasoning in an opinion that then becomes the precedent for the court which may be appealed by the parties to the Supreme Court of the United States.

But putting this concern to one side, the very fact that the concurrences have felt need to offer up the additional support that they have is confirmation that the panel at

least now senses the analytical softness of its opinion. There would otherwise be no reason to attempt to shore up that opinion with these additional materials, which the panel fully considered originally and rejected as not providing any support for its conclusion that the location of seizure was "undisputed."

In any event, apart from their irrelevancy now as a matter of law given that they were not relied upon in the panel opinion, these additional materials, as the panel originally concluded, do not any more prove an affirmative concession that Hamdi was captured in a foreign combat zone, than do the statements contained in the petition filed by the next friend – even if, in combination with that sole filing relied upon by the panel, they render the case slightly closer.

Judge Wilkinson quotes from a traverse filed in the district court which reads that the petitioner's claim does not "implicate Respondents' initial detention of Petitioner Hamdi in Afghanistan." J.A. 64. Much like the acknowledgment of Hamdi's place of residence, the observation that Hamdi's claim does not implicate his initial *detention* does not, and certainly should not in a court, say anything about where he was originally *seized* – at least not necessarily. As does the law, these parties themselves distinguish between seizure and detention throughout their submissions. If there were any doubt as to the inappropriateness of drawing such an irrebuttable inference as to place of seizure from place of detention in this instance, it should be put to rest by the fact that that very same traverse filing states that "[p]etitioner in no way concedes that Respondents' factual assertions are true." J.A. 65 n.1. Indeed, it even specifically states that "information about Petitioner Hamdi prior to his transfer to the custody of

[the government] is based on the hearsay of unknown members of the Northern Alliance." *Id.* The other materials with which the concurrences now attempts to support the panel's opinion suffer from the same flaw, as they too speak only as to the place of detention, not the place of seizure.

Thus, neither the panel nor even the concurrences after the fact, adduce a single statement from Hamdi's petition or any other filing in this case in which there appears a concession that Hamdi was captured or seized in a foreign zone of active combat operations. A single example suffices to show the extent of the reach attempted by the panel. The concurrences now cite even to a defense counsel's single word of agreement with a statement made by the district court that Hamdi was "in a fighting situation." *Ante* at 17-18 n.2 (citing Tr. of Aug. 13, 2002 district court proceedings). Not only is this single word of agreement with this statement made by the district court ambiguous on its face, it is followed by defense counsel's statement – omitted by the concurrences – that "what is the problem with all of that, of course, is that we have absolutely no detail with regard to the circumstances under which he was initially captured. . . . We don't know what happened." J.A. 394.

D.

But more important than the substantive content of any of these several oblique references marshaled by the concurrences in *en banc* denial is their source. These statements, however they are interpreted, are not from Hamdi or from counsel acting on his behalf. They are from Hamdi's father, acting as next friend, who, it has been

represented to us, has not even had any contact with his son since the latter was seized over a year ago. As Judge Motz recognizes, even an unambiguous concession as to the location of Hamdi's seizure in such a third party submission cannot, as a legal matter, bind Hamdi to a fact that in turn is deemed dispositive of his claim for freedom.

In no sense, then, is the place of Hamdi's seizure "undisputed" by the parties to this suit. An opinion that rests exclusively on the premise of a stipulated agreement as to this circumstance of seizure, as does the panel's, is simply unconvincing. And it is rendered no more convincing, even if it is thought more palatable, by the fact that resting decision on this ground permits superficial distinguishment on fact (though not in principle) of the case in which a citizen seized on American soil is denominated an enemy combatant, *see Hamdi III*, 316 F.3d at 465 (citing and distinguishing *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002)), which case the panel feared might unavoidably be reached by a decision on the issue as presented and under the facts as proffered.

E.

Judge Traxler writes extensively in defense of the panel opinion, although, beyond embracing the materials newly cited by Judge Wilkinson, he does little more than repeat at length the panel's reasoning (where needed, embroidering upon that opinion for himself), and quote liberally from this and Judge Motz's opinion. But the juxtaposition of the particular defenses that he chooses to make, with their obvious responses, all but confirms to the careful reader the shortcomings in the panel's opinion. It is undoubtedly for this reason that Judge Traxler's

co-panelists, who, with him, jointly authored the original opinion, do not align themselves with him today.

1.

To begin with the most significant, Judge Traxler, though writing to bolster the panel's conclusion that the place of seizure in a foreign combat zone was in fact conceded in the next friend petition, actually ends up admitting that the petition itself does *not* explicitly concede seizure in such a zone. *See, e.g., ante* at 23-24 ("Judge Luttig correctly observes that the habeas petition does not *explicitly* state that 'Hamdi was captured in a zone of active combat in a foreign theater of conflict.'"); *id.* at 23 (stating that "the petition[] fail[s] to affirmatively state that Hamdi was captured in a foreign combat zone"). This is an admission of no small consequence, of course, for the panel relied entirely upon the existence of such a concession of capture in a foreign combat zone in the petition, and the opinion plainly regarded this concession as having been made explicitly and unequivocally. Certainly, until today, the reader would have never thought otherwise. Nowhere, for instance, is there even the slightest suggestion that the panel regarded this dispositive concession as merely "implicit." And there certainly is no mention of any inferential steps of which one would expect explanation before a dispositive concession is implied by a court.

By this candid admission alone, Judge Traxler has made out the case against the panel's opinion better than have either Judge Motz or myself. For if, as Judge Traxler says, this is a "momentous" case, then he has now confirmed that it was dismissed on the basis of a concession believed by the panel (though disputed by the parties) to

have been made only "implicitly," and at that, by a third party to the action who not only had had no contact whatsoever with the petitioner himself, but who even disavowed that he could speak to the facts except upon information and belief.

Unwittingly compounding further the analytical problems that beset the panel's opinion as it is written, Judge Traxler next attempts to marshal for the first time support for what was the panel's assumed, but wholly unsupported, holding that a next friend may concede facts sufficient to conclude a litigation when the detainee is inaccessible to the next friend by reason of the respondent's own actions. All that need be said as to this effort is that, after now critically addressing himself as a single judge to the proposition that the panel originally uncritically assumed, Judge Traxler is able to cite only a single case and that of a district court almost forty years ago. *See ante* at 29 (citing *Hall v. Hague*, 34 F.R.D. 449 (D. Md. 1964)). *And not even that case holds that a next friend may concede the facts that will lead to the dismissal of the plaintiff's suit in circumstances anywhere approaching those presented by this case.* Thus, on this score as well, has Judge Traxler made the case for dissent better than have either Judge Motz or myself.

Judge Wilkinson, to his credit, recognizes as much, and attempts to salvage the panel opinion on this critical point by asserting that "ordinary civil [and] criminal litigants" *cannot* be bound by next friend concessions, but that Hamdi *must be so bound*, for the reason that he allegedly was seized in a foreign zone of active combat operations. *See ante* at 17-18 n.2. But in attempting the salvage, Judge Wilkinson himself comes very close (although he does not realize it) to outright conceding the

indefensibility of the point, because the binding character of a next friend concession obviously does not turn upon whether the concession is or is not made on behalf of an individual allegedly seized abroad, or even an individual seized abroad in a foreign theater of battle. Nor does the separation of powers have anything to do with this necessary legal fact. And even if the binding character of a next friend concession somehow did turn upon the location of the petitioner's seizure, the principle would cut in precisely the opposite direction from that believed by Judge Wilkinson: the alleged concession might be binding upon one seized domestically with whom the next friend is in unfettered contact, but presumptively would never be binding upon one seized abroad and held incommunicado.

In tacit recognition that these belated arguments as to the fact of concession and the legal acceptability of third-party fact concessions ring hollow, Judge Traxler (notably speaking only for himself) suggests finally that the panel would have reached the same outcome in this case even had it not concluded that the place of seizure was undisputed. *See ante* at 37 ("Nor for that matter, did we even hold that the Mobbs Declaration would have been insufficient had the place of capture been in dispute in this case."). I do not know quite how to respond to this statement, because I am in no position to say that, irrespective of what the panel wrote, it would not have decided the case differently had it concluded that the location of seizure was disputed. All that I, the parties, and the public can do is reason inferentially from the opinion for the court, which the panel did write. And based upon that opinion, while Judge Traxler may now in hindsight characterize the supposed concession by Hamdi's next friend as insignificant, the panel opinion he co-authored treats it as

anything but. The opinion well speaks for itself in rebuttal to this suggestion. Said the panel, in emphasized words that Judge Traxler would have us overlook today, the concession of seizure in a combat zone made in the petition is "crucial to our analysis." *Hamdi III*, 316 F.3d at 471.

Thus, while Judge Traxler may now want to say that the panel would decide the case no differently absent a concession, he is faced with self-contradiction to so maintain, given that the opinion he co-authored went out of its way to denominate as "crucial" to its analysis the concession that it mistakenly believed was made. The unavoidable inference to be drawn from such a characterization of fact dispositively relied upon is not, as Judge Traxler would now have it, that absent that fact, the disposition would still be the same, but rather, that the disposition reached on the strength of that fact quite likely would be different if the fact were otherwise.

2.

Unable to shore up the foundation of the panel's opinion, that Hamdi's next friend conceded that Hamdi was seized in a zone of active combat operations and bound Hamdi to that fact, Judge Traxler attempts to shift the focus away from the panel's opinion and the ultimate legal issue entirely, by erecting and then attacking a series of straw man arguments he ascribes to this dissent. Thus, he suggests that I argue that the facts alleged in the petition should be taken as false, *ante* at 27-28, and that I am "attempt[ing] to rewrite the case history and the substance of the habeas claim," *ante* at 28. Of course, I make no such arguments. I make the simple point that the petition does not affirmatively concede capture in a foreign

combat zone, a fact that Judge Traxler now admits, *see ante* at 23.

Judge Traxler next argues that I have unfairly stated that neither party has attempted to defend the significance of the place of capture, *ante* at 37-38. Again, I make no such statement. What I have stated is that neither party assigned any legal significance to the argument relied on by the panel that the locus of capture was "undisputed." (And, given the record as I have recited it herein, it is unsurprising that they did not.) But to remove the source of my objection from all doubt, and as I explain more fully below, it is *not* the panel's reliance on the place of capture that troubles me. Rather, it is the panel's indefensible reliance on an assumed concession by the petitioner, as opposed to a proffer by the government, to establish this "fact."

In his final attempt to shift the focus to a criticism that I have not made, but to which response is easier, Judge Traxler asserts that I am criticizing the panel for issuing a narrow, as opposed to a broad, holding. *See ante* at 37. As I have quite clearly said, however, the panel's error in my view was not in its search for a narrower ground, but rather in the unpersuasiveness of the putatively narrower ground on which it ultimately relied – a concession by Hamdi as to the place of his seizure. Not only is this narrower ground of concession factually unpersuasive, it is also unpersuasive as a matter of law, for the reasons Judge Motz and I have set forth.

3.

When all is said and done, then, Judge Traxler's writing today both confirms the vulnerabilities inherent in

the panel's opinion he seeks to defend and puts the lie to the panel's assertion that, by grounding its decision on the reputed concession by Hamdi's next friend, it *both* provided Hamdi meaningful judicial review *and* protected the President's Article II powers to determine who and who are not enemies of the United States.

As to the former, not only does he admit that there is no such explicit concession as the panel believed, but he is forced as well to acknowledge that there is not even legal support for the panel's unexamined supposition that a next friend can actually concede a dispositive fact without even the petitioner's knowledge. As to the latter, his analytical admissions betray well that Hamdi was not provided the meaningful judicial review that he was promised. And, through his attempt to discount the importance of the supposed concession to the panel's disposition, he only draws attention to the pivotal importance of that supposed concession and thereby to the trifling deference the panel accorded the President of the United States in his determinations of who constitute enemies of our Country. A more forceful explanation of the grounds for dissent I could not make.

II.

Because of the overarching importance of the opinion of law that resolves the issue presented by this appeal, because of the panel opinion's dismissiveness of the substantial interests at stake in this case for both citizen and government, and because of the analytical vulnerability of the court's opinion as it stands, I believe that both the United States and the petitioner would be served by reconsideration by our full court.

Upon reconsideration, we should decide the critical issue of the appropriate standard that is to govern the Judiciary's review of an individual's challenge to an Executive designation of enemy combatant status, the indecision of which by the panel I believe fails to serve the substantial interests of not only the parties but also the public in the resolution of this issue. Having decided the governing standard, we should decide the issue of whether that standard has been satisfied in this case by the government's proffer of the facts contained in the Michael H. Mobbs affidavit, the like indecision of which by the panel also, I believe, fails to serve the parties and the public.

III.

Although I reserve ultimate judgment because of the difficulty of the issue and because I write in dissent from the request to rehear the case and therefore without the benefit of argument, I believe, as to the standard of review, that the government may be correct that

> [p]roper respect for separation of powers and the limited role and capabilities of courts in matters of national security may well limit the courts to the consideration of legal attacks on detention of the type considered in [*Ex parte*] *Quirin*[, 317 U.S. 1 (1942)] and [*In re*] *Territo*, [156 F.2d 142 (9th Cir. 1946),] and raised by the petition in this case. At most, however[ ] . . . a court's proper role in a habeas proceeding such as this would be to confirm that there is a factual basis supporting the military's determination that a detainee is indeed an enemy combatant.

Br. of Respondents-Appellants at 28 (internal citation omitted); *see also id.* at 36 ("[T]o prevail under a

constitutionally appropriate standard, the government would at most need to provide some factual basis for supporting the military's determination that Hamdi is an enemy combatant."). That is, I believe that the President of the United States may well be entitled under the Constitution to receive from the Judiciary the deference afforded by a standard selected from those along this continuum, when, in exercise of the powers conferred upon him by Article II of the Constitution, he designates a person as an enemy combatant against this Nation.

As to the application of the standard to the facts proffered by the government in support of the Executive's designation of Hamdi as an enemy combatant, I reserve ultimate judgment for the same reasons. I am prepared to say, however, that I would likely conclude, as argued by the United States, that the facts recited in Special Advisor Mobbs' affidavit, as to which there is not even hint of fabrication, are sufficient to satisfy the constitutionally appropriate standard for the President's designation of an enemy of the United States.

This affidavit states that Hamdi traveled to Afghanistan in the summer of 2001, where he promptly affiliated with a Taliban military unit and received weapons training. It further states that during a battle between the Taliban and the Northern Alliance later that year, Hamdi's Taliban unit surrendered to Northern Alliance forces. It continues that Hamdi was directed to surrender his Kalishnikov assault rifle (*i.e.*, AK-47) to Northern Alliance forces and was subsequently imprisoned. The affidavit represents that, while in prison, Hamdi was determined by the United States military screening team to meet the criteria for enemy combatants over whom the United States was taking control. And finally, the affidavit relates

that in January 2002, a Detainee Review and Screening Team established by the Commander of the United States Central Command reviewed Hamdi's record and determined again that he met the criteria established by the Secretary of Defense for individuals over whom United States forces should take control and transfer to Guantanamo Bay.

In addition to these declarations made under penalty of perjury by the appointed representative of the government, the President of the United States, through his Solicitor General, has represented to this court that in his judgment Hamdi is indeed an enemy combatant, detention of whom is warranted in the interests of national security.

The panel's contrary holding notwithstanding, I suspect that more than this would be unnecessary to affirm the President's decision to designate Hamdi an enemy of the United States.

In all events, I believe that it is the obligation of this court to decide these issues that have been presented to us by the United States and by one of its citizens. At times, judicial avoidance of the difficult and the politically charged is the more prudent and the more faithful to the judicial role, both. This is a case in which it is neither.

* * *

For the reasons set forth, I would grant the suggestion for rehearing *en banc*. Accordingly, I respectfully dissent from the court's denial of that suggestion.

DIANA GRIBBON MOTZ, Circuit Judge, dissenting from denial of rehearing en banc:

For more than a year, a United States citizen, Yaser Esam Hamdi, has been labeled an enemy combatant and held in solitary confinement in a Norfolk, Virginia naval brig. He has not been charged with a crime, let alone convicted of one. The Executive will not state when, if ever, he will be released. Nor has the Executive allowed Hamdi to appear in court, consult with counsel, or communicate in any way with the outside world.

Precedent dictates that we must tolerate some abrogation of constitutional rights if Hamdi is, in fact, an enemy combatant. However, a panel of this court has held that a short hearsay declaration by Mr. Michael Mobbs – an unelected, otherwise unknown, government "advisor," – "standing alone" (subject to no challenge by Hamdi or court-ordered verification) is "sufficient as a matter of law to allow meaningful judicial review" and approval of the Executive's designation of Hamdi as an enemy combatant. *See Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003). I cannot agree.

To justify forfeiture of a citizen's constitutional rights, the Executive must establish enemy combatant status with more than hearsay. In holding to the contrary, the panel allows appropriate deference to the Executive's authority in matters of war to eradicate the Judiciary's own Constitutional role: protection of the individual freedoms guaranteed all citizens. With respect, I believe the panel has seriously erred, and I dissent from the court's refusal to rehear this case *en banc*.

I.

The panel's decision marks the first time in our history that a federal court has approved the elimination

of protections afforded a citizen by the Constitution solely on the basis of the Executive's designation of that citizen as an enemy combatant, without testing the accuracy of the designation. Neither the Constitution nor controlling precedent sanction this holding.

The rights provided in the Constitution to each American citizen include the right to due process of law and to petition for a writ of habeas corpus. U.S. Const. amend. V; art. I, § 9. Unquestionably, the availability of habeas relief extends to detention pursuant to the Executive's military authority. *See, e.g., Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). Just as clearly, the responsibility for ensuring that individuals detained by the Executive receive the due process guarantees of the Constitution, including the right to petition for habeas corpus, rests with the courts. *See In re Yamashita*, 327 U.S. 1, 9 (1946). As the Supreme Court has explained, "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions," *Sterling v. Constantin*, 287 U.S. 378, 401 (1932); *see Duncan*, 327 U.S. at 322-23; and the "government must always be accountable to the judiciary for a man's imprisonment." *Fay v. Noia*, 372 U.S. 391, 402 (1963), *overruled on other grounds, Coleman v. Thompson*, 501 U.S. 722 (1991).

The panel acknowledges as much, conceding that "[t]he duty of the judicial branch to protect our individual freedoms does not simply cease whenever our military forces are committed by the political branches to armed conflict" and that "detention of United States citizens must be subject to judicial review." *Hamdi*, 316 F.3d at 464. Further, the panel recognizes that Hamdi, "an American

citizen currently detained on American soil," is entitled to petition for a writ of habeas corpus and that habeas proceedings "naturally contemplate[] the prospect of factual development." *Id.* at 470, 473. The panel even recognizes the inadequacy of the sole "evidence" the Executive has proffered to support its enemy combatant designation of Hamdi – the Mobbs declaration – for it admits that "a capable attorney could challenge the hearsay nature of the Mobbs declaration and probe each and every paragraph for incompleteness or inconsistency." *Id.* at 473. Yet, the panel concludes that "no . . . factual inquiry on our part is necessary or proper" and that "Hamdi is not entitled to challenge the facts presented in the Mobbs declaration." *Id.* at 473, 476.

The panel suggests that this conclusion accords with precedent. *See id.* at 475 ("this same issue arose in *Quirin* . . . the *Quirin* principle applies here"). In fact the Supreme Court has *never* held that a person designated by the Executive as an enemy combatant cannot challenge that designation or that a court cannot require the Executive to substantiate it. In the case on which the majority relies, *Ex Parte Quirin*, 317 U.S. 1 (1942), the Court did hold that for a violation of the laws of war, even an American citizen could be treated as an "enemy combatant" and held without the full array of Constitutional rights, but only because *the citizen, after consultation with legal counsel, stipulated to the facts supporting the enemy combatant designation.*

Thus, in *Quirin*, a German-born soldier, who claimed to be an American citizen, stipulated that after receiving payment by the German government and instruction by the "German High Command to destroy war industries and war facilities in the United States," he and six other

German soldiers secretly landed in the United States during World War II with "a supply of explosives." *Id.* at 20-21. Only after finding that these "conceded facts" demonstrated "plainly" that the soldiers were within the "boundaries of the jurisdiction of military tribunals," did the Supreme Court reject their contention that they could not be tried by a military commission. *Id.* at 46. Critical to the case at hand, the Court first expressly rejected the Executive's argument that the soldiers, "must be denied access to the courts because they are enemy aliens who have entered our territory." *Id.* at 24-25. Instead, each of the soldiers was permitted, with the assistance of counsel, to file his *own* (not a next friend) petition for a writ of habeas corpus, which the courts reviewed to ensure that each soldier was in fact an enemy combatant. *Id.*

None of the few other Supreme Court cases addressing the rights of enemy combatants involved American citizens. But even when dealing with the claims of German and Japanese citizens detained by military authorities outside the United States during World War II, the Court has never suggested that an enemy combatant is without recourse to challenge that designation in court. On the contrary, the Court has held that a resident alien – who, the Court specifically noted, has far less status than those, like Hamdi, who enjoy the "high privilege" of citizenship – *can* challenge the Executive's designation of him as an enemy. *Johnson v. Eisentrager*, 339 U.S. 763, 770, 775 (1950) (internal quotation marks and citation omitted). As the Court explained: *"Courts will entertain his plea* for freedom from Executive custody only *to ascertain* the existence of a state of war and *whether he is an alien enemy." Id.* at 775 (emphasis added); *see also id.* at 784-85; *Ludecke v. Watkins*, 335 U.S. 160, 171 n.17 (1948) (noting

that "whether the person restrained is in fact an alien enemy . . . may also be reviewed by the courts"); *Yamashita*, 327 U.S. at 8 (noting that "[t]he courts may inquire whether the detention complained of is within the authority of those detaining the petitioner" and "the Executive branch of the government could not, unless there was a suspension of the writ, withdraw from the courts the duty and power" to inquire whether the "Constitution or laws of the United States withhold authority" from a military tribunal).

Moreover, the Supreme Court has upheld the Executive's designation of a person as an enemy alien or enemy combatant only when presented with *facts* supporting this designation – facts stipulated by the petitioner with the advice of counsel, as in *Quirin*, or facts proved by the prosecution at a military trial in which the petitioner was afforded counsel, as in *Yamashita*. In the case at hand, no facts have been presented to support the Executive's designation. The Executive has not permitted Hamdi to consult with counsel or challenge the allegations contained in the Mobbs declaration. And Hamdi has certainly not stipulated to anything. Denied the most basic procedural protections, Hamdi could not possibly mount a challenge to the Executive's designation of him as an enemy combatant. Yet in *Eisentrager*, *Ludecke*, and *Yamashita* the Supreme Court has explained that even aliens are entitled to precisely this right. Thus, far from supporting the panel's position, controlling precedent prohibits its approach.

II.

Without any acknowledgment of its break with precedent, the panel embarks on a perilous new course – approving the Executive's designation of enemy combatant status not on the basis of facts stipulated or proven, but solely on the basis of an unknown Executive advisor's declaration, which the panel itself concedes is subject to challenge as "incomplete[]" and "inconsisten[t]" hearsay. *Hamdi*, 316 F.3d at 473. My good colleagues' opinion, although well-intentioned and replete with compelling declarations of separation-of-powers principles with which no one would quarrel, utterly fails to set forth an adequate rationale for its breathtaking holding.

Indeed, the panel offers only a single justification for its unprecedented decision to permit the Executive to support its designation of Hamdi as an enemy combatant with pure hearsay: Hamdi's capture in a "zone of active combat" was assertedly "undisputed." *See Hamdi*, 316 F.3d at 459 ("*Because it is undisputed* that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold the submitted declaration is . . . sufficient." (emphasis added)); *id.* at 476 ("Hamdi is not entitled to challenge the facts presented in the Mobbs declaration," because he "has been designated an enemy combatant and *it is undisputed* that he was captured in a zone of active combat operations abroad." (emphasis added)). According to the panel, this apparently all-important fact is "undisputed" because "Hamdi's petition places him squarely within the zone of active combat." *Id.* at 474; *see also id.* at 460-61.

This is a thin reed on which to rest abrogation of constitutional rights, and one that collapses entirely upon

examination. For Hamdi has never been given the opportunity to dispute any facts. The "facts" as to the place of Hamdi's "capture" could only be "undisputed" by reliance on a facially innocuous statement in a petition filed by Hamdi's father, as his "next friend." Thus, the panel determines that a petition filed by a next friend on behalf of, but without access to or consultation with, the petitioner constitutes a binding admission by the petitioner that results in the forfeiture of the petitioner's constitutional rights. This holding flatly contravenes venerable Supreme Court precedent. The Court long ago held that "a next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of" the represented party. *Kingsbury v. Buckner*, 134 U.S. 650, 680 (1890); *see also White v. Miller*, 158 U.S. 128, 146 (1895) (same); *Stolte v. Larkin*, 110 F.2d 226, 233 (8th Cir. 1940) (collecting cases).[1]

[1] Judge Wilkinson contends in his concurrence to the order denying rehearing *en banc* that these cases do not apply to Hamdi because he is an enemy combatant who is not entitled to rights "enjoyed by ordinary civil or criminal litigants." *See ante* at 17-18 n.2. This reasoning is dizzyingly circular. The panel relied heavily on an admission of Hamdi's next friend (who had no opportunity to consult with Hamdi) to find Hamdi an enemy combatant. Now, Judge Wilkinson maintains that *because* Hamdi is an enemy combatant, *White* and *Kingsbury* do not apply, and Hamdi is bound by his next friend's assertedly critical admission. *Id.* Thus, Judge Wilkinson seeks to use the panel's conclusion (that Hamdi is an enemy combatant) to justify the panel's improper reliance on an admission of Hamdi's next friend, which provides the very basis for that conclusion. In sum, according to Judge Wilkinson, because Hamdi's next friend made a purportedly devastating admission, Hamdi forfeits all rights to challenge that admission, and ultimately all constitutional rights. Surely this does not constitute the "meaningful judicial review" that the panel promised. *See Hamdi*, 316 F.3d at 462, 473.

(Continued on following page)

Just as importantly, even if the statement in his father's petition that "[w]hen seized," Hamdi "resided in Afghanistan," J.A. 9, somehow translated into Hamdi's admission that he was captured "in a zone of active combat," *Hamdi*, 316 F.3d at 459, this should not render the Executive's designation of enemy combatant status irrebuttable. The ramifications of such a holding are chilling. Pursuant to the panel's decision, for example, any of the "embedded" American journalists covering the war in Iraq or any member of a humanitarian organization working in

Nor does the district court opinion, *Hall v. Hague*, 34 F.R.D. 449 (D. Md. 1964), relied on by Judge Traxler in his concurrence, *ante* at 29, offer support for the panel's startling approach. In *Hall*, a district judge merely determined that the guardian *ad litem* of a minor could admit certain housekeeping matters prior to trial, on the understanding that "[a]*t the trial*, the judge will be able to tell if any unjustified admissions have been made and take appropriate action." *Id.* at 449-50 (internal quotation marks and citation omitted) (emphasis added). This is a long way from holding, as the panel does (ignoring *Kingsbury* and *White*), that a statement in a petition filed by Hamdi's next friend constitutes an admission by Hamdi providing the basis for denial of his constitutional rights and indefinite imprisonment, *without the benefit of any trial*. Indeed, Judge Traxler's assertion that "there is no reason to believe that [Hamdi's] rights are being bargained away or that a factual mistake is being made," in the next friend petition, *ante* at 29 n.7, ignores the obvious. How could there be any "reason to believe that rights are being bargained away or that a factual mistake is being made" when the only person who could offer such a reason or contest a factual mistake – Yaser Esam Hamdi – has never been given the chance to do so? By keeping Hamdi imprisoned incommunicado, the Executive has denied him this opportunity. Thus, we simply have no idea whether his "rights are being bargained away" or "a factual mistake is being made." It is precisely to avoid resolving an individual's fate on such uncertain grounds that the Supreme Court has held that a next friend petition "cannot be excepted to for insufficiency, nor can any admission . . . be binding." *White*, 158 U.S. at 146.

Afghanistan,[2] could be imprisoned indefinitely without being charged with a crime or provided access to counsel if the Executive designated that person an "enemy combatant." Indeed, under the panel's holding, any American citizen seized in a part of the world where American troops are present – *e.g.*, the former Yugoslavia, the Philippines, or Korea – could be imprisoned indefinitely without being charged with a crime or afforded legal counsel, if the Executive asserted that the area was a zone of active combat.[3] Thus, the only basis for relying on a hearsay declaration to approve the Executive's designation of Hamdi as an enemy combatant, *i.e.*, Hamdi's assertedly "undisputed capture[] in a zone of active combat," is in truth a chimera and certainly provides no justification for the panel's extraordinary holding.

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[2] I note that in a letter to Senator Patrick Leahy, contained in the record, but ignored by the panel, Hamdi's father, in fact, states that his son went to Afghanistan less than two months before September 11, 2001 to do "relief work," was "trapped in Afghanistan once that military campaign began," could not have received military training, and was never an enemy combatant. J.A. 153-54.

[3] I find puzzling the contention that the panel opinion "does not speak to the issue of whether an 'enemy combatant' may challenge the government's claim that the former Yugoslavia, the Philippines, or Korea is a zone of active military operations," *ante* at 36-37. First, no basis is provided for distinguishing between the "troops . . . still on the ground in Afghanistan," *Hamdi*, 316 F.3d at 476, and American troops "on the ground" in the former Yugoslavia, the Philippines, or Korea. Moreover, in suggesting that a person detained in one of those countries might be able to challenge the Executive's designation of that country as a zone of active military operations, the concurrence necessarily implies that the question of what constitutes such a zone is justiciable – a conclusion seemingly at odds not only with the panel opinion, *see* 316 F.3d at 476 (dismissing Hamdi's contention that hostilities in Afghanistan had ended), but also with the concurrence itself. *See ante* at 32 n.9.

Nor, as the panel implicitly acknowledges, does the two-page, nine paragraph Mobbs declaration by itself, provide such justification. The panel's assessment of the Mobbs declaration is entirely accurate; that declaration could indeed be easily and successfully "challenge[d]" as "hearsay," and "probe[d]" for "incompleteness or inconsistency." *Hamdi*, 316 F.3d at 473.[4] The declaration contains no indicia of reliability except for Mr. Mobbs' oath – which seems of minimal value given that Mr. Mobbs does not claim *any* personal knowledge of the facts surrounding Hamdi's capture and incarceration. Rather Mr. Mobbs states that his "familiar[ity]" with "the facts and circumstances" surrounding Hamdi's capture, is "[b]ased upon" his review of undisclosed and unenumerated "relevant records and reports." J.A. 61. In fact, Mr. Mobbs himself did not (perhaps could not) make the determination that Hamdi is an "enemy combatant." Instead, Mr. Mobbs can merely declare that, according to "records and reports," "Hamdi was determined by the U.S. military screening team to meet the criteria for enemy combatants." J.A. 62. The Mobbs declaration does not even state what, if any, evidence this "U.S. military screening team" relied on in making that determination or whether Mr. Mobbs himself conducted any independent review of this evidence. Indeed, the declaration's statement that Northern Alliance troops initially captured Hamdi suggests that even the U.S. military does not have any first-hand knowledge of Hamdi's conduct or status in Afghanistan.

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[4] The panel twice details the statements made in the Mobbs declaration, *Hamdi*, 316 F.3d at 461 and 472, and the Executive forcefully contends that the declaration meets the "some evidence" standard, but the panel carefully refrains from so holding. *Id.* at 474.

In sum, the record provides no credible evidence supporting the Executive's designation of Hamdi as an enemy combatant. Accordingly, a court has no basis upon which to perform its constitutional duty "'to examine'" the "'validity'" of the "'reason'" for Hamdi's "'commitment.'" *See Ex parte Merryman*, 17 F. Cas. 144, 150 (No. 9,847) (C.C. Md. 1861) (noting "'the absolute necessity of expressing upon every commitment the reason for which it is made, [and] that the court, upon a habeas corpus, may examine into its validity'" (quoting 3 Blackstone, Commentaries 133, 134)). Thus, although the panel steadfastly maintains that it engages in a "meaningful judicial review," *see Hamdi*, 316 F.3d at 462, 473, its rubberstamp of the Executive's unsupported designation lacks both the procedural and substantive content of such review.[5]

At the same time, I hasten to note that the total inadequacy of the Executive's proffer and the panel's

[5] Moreover, while I applaud the panel's attempt to confine its holding to the facts at hand, without effect on the rights of citizens captured on American territory, *see Hamdi*, 316 F.3d at 465, similar attempts to constrain judicial holdings have proved unavailing. As Justice Jackson recounted, despite the Supreme Court's careful efforts to limit the scope of its holding in *Hirabayashi v. United States*, 320 U.S. 81 (1943), to the specific facts of that case, *see id.* at 101-02, 105, the Court later determined that *Hirabayashi* dictated the holding in *Korematsu v. United States*, 323 U.S. 214, 218 (1944). *See id.* at 247 (Jackson, J., dissenting) ("The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding."). I fear that the panel may also have opened the door to the indefinite detention, without access to a lawyer or the courts, of any American citizen, even one captured on American soil, who the Executive designates an "enemy combatant," as long as the Executive asserts that the area in which the citizen was detained was an "active combat zone," and the detainee, deprived of access to courts and counsel, cannot dispute this fact.

review here does not provide license for a searching judicial inquiry into the factual circumstances of every detainee's capture, or require compliance with a production order as demanding as that called for by the district court.[6] Such an approach could hamper the Executive's ability to wage war, as the panel explains at length. *See Hamdi*, 316 F.3d at 469-473. But the possibility, no matter how real, that an improperly conducted judicial inquiry could impair the Executive's ability to wage war cannot, as the panel seems to believe, provide a justification for holding that the Executive can indefinitely detain an American citizen (even one captured in a zone of active hostilities) without producing any credible evidence that the citizen is an "enemy combatant." The Constitution gives Congress, not the Executive and not the courts, the power to suspend the writ of habeas corpus when the public safety requires it. U.S. Const. art. I, § 9. Absent a suspension of the writ, the Constitution demands that we strike the proper balance between ensuring the Executive's ability to wage war effectively *and* protecting the individual rights guaranteed to all American citizens. *See Yamashita*, 327 U.S. at 8. Without such a balance, our system of ordered liberty will indeed ring hollow.

Thus, in contrast to the panel's holding, which effectively transforms the asserted "fact" of being captured in a

[6] Although I agree with the panel that the district court's production order required too much, the experienced district judge should be commended nonetheless. For, during wartime and in the face of opposition by representatives of a President enjoying record popular support, the district judge has courageously attempted to provide the meaningful judicial review that the Constitution mandates, however unpopular the case.

zone of active hostilities into an *irrebuttable* presumption of "enemy combatant" status,[7] a court could regard such a "fact" as creating a *rebuttable* presumption, thereby shifting the burden to Hamdi (and others like him) to establish that he was *not* an "enemy combatant." The burden of persuasion would then be on Hamdi, with the aid of counsel, to proffer affirmative evidence of his "non-combatant" status. This would seem to be the course dictated by precedent.

Alternatively, if the Executive produced the "relevant records and reports" on which Mr. Mobbs relied in making his declaration, a court might be able to assure itself of the legitimacy of the Executive's designation. (Of course, the possibility that the "relevant records" pertaining to Hamdi's detention might contain *no evidence* that he was an "enemy combatant" is precisely the reason why judicial review is necessary.) The Department of Defense has obviously already compiled and collected these records. Producing them for judicial review, *ex parte* and *in camera* if necessary, would not in any way hamper the Executive's

[7] Notwithstanding Judge Traxler's contention, nineteenth and early twentieth century takings cases do not support the panel's *de facto* creation of this irrebuttable presumption to justify Hamdi's indefinite imprisonment. *Cf. ante* at 32. Those cases, upholding the wartime destruction or seizure without compensation of *property* outside the United States, including property owned by U.S. citizens, do broadly note that "[i]n war, all residents of [an] enemy country are enemies." *Lamar v. Browne*, 92 U.S. 187, 194 (1875). But *no liberty* rights of U.S. citizens were at issue in any of those cases or their progeny. *See, e.g., Juragua Iron Co. v. United States*, 212 U.S. 297, 305-306 (1909); *Lamar*, 92 U.S. at 194. Indeed, the Supreme Court has never held that an American citizen becomes an "enemy" and can be deprived of his liberty rights solely by virtue of residing in an enemy country during wartime.

ability to wage war. Indeed, the Executive has apparently already made similar productions in other cases. *See Padilla v. Bush*, 233 F. Supp. 2d 564, 608 (S.D.N.Y. 2002); *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002). Such evidence might suffice to substantiate the Executive's designation.[8]

But in all events, the Executive must offer more than hearsay to support that designation; and so in answer to the question certified to us – "[w]hether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yasser Esam Hamdi's classification as an enemy combatant?" – the answer must be, "No."

III.

In conclusion, I must note that I have no doubt that, in this time of great challenge for our Nation, the Executive has acted in good faith when designating Hamdi an enemy combatant. Under our Constitution, however, it is the responsibility of the courts to ensure that American citizens are not deprived of liberty without due process of law, regardless of the personal belief of any individual judge concerning the integrity of the Executive. As the

[8] In *Padilla*, now certified for interlocutory appeal to the Second Circuit, the district court ruled that it would apply the "some evidence" standard suggested by the Executive, once Padilla – with the assistance of counsel – "presents any facts he may wish to present to the court" regarding his designation as an enemy combatant. *Padilla*, 233 F. Supp. 2d at 608, 610; *Padilla v. Rumsfeld*, 2003 WL 1858157 (S.D.N.Y. April 9, 2003) (granting government's motion to certify orders in case for interlocutory appeal).

Framers well understood, the Executive branch must be subjected to checks on its power if individual liberties are to be preserved. *See Duncan*, 327 U.S. at 322-23; *see also United States v. Robel*, 389 U.S. 258, 264 (1967).

But one need not refer back to the time of the Framers to understand that courts must be vigilant in guarding Constitutional freedoms, perhaps never more so than in time of war. We must not forget the lesson of *Korematsu*, a case in which the Supreme Court sanctioned the military internment of thousands of American citizens of Japanese ancestry during World War II. *See* 323 U.S. at 219. In its deference to an Executive report that, like the Mobbs declaration, was filed by a member of the Executive associated with the military and which purported to explain the Executive's actions, the Court upheld the Executive's conviction of Korematsu for simply remaining in his home, in violation of the military internment order. *See id.* at 215-16.

Of course, history has long since rejected the *Korematsu* holding. Indeed, Congress itself has specifically repudiated *Korematsu*, recognizing that "a grave injustice was done to" those "of Japanese ancestry by th[e] actions . . . carried out without adequate security reasons and . . . motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." 50 App. U.S.C.A. § 1989a(a) (West 1990). But in truth, here, as in *Korematsu*, the Executive has failed to proffer any real evidence to justify its action. When presented with no basis for reviewing the Executive's designation that an American citizen is an enemy combatant, other than the assurance of a Defense Department "advisor" that someone in the United States military made this determination, a court must demand more. *Cf. Korematsu*, 323 U.S. at 245

(Jackson, J., dissenting) ("So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination.").

The Executive's treatment of Hamdi threatens the freedoms we all cherish, but the panel's opinion sustaining the Executive's action constitutes an even greater and "more subtle blow to liberty." *Id.* at 245-46 (Jackson, J., dissenting). For although the incommunicado imprisonment of Hamdi will hopefully terminate some day, the panel opinion rationalizing this imprisonment will live on. As Justice Jackson warned, when the Executive "overstep[s] the bounds of constitutionality, . . . it is an incident," but when a court "review[s] and approve[s], that passing incident becomes the doctrine." *Id.* at 246.

Courts have no higher duty than protection of the individual freedoms guaranteed by our Constitution. This is especially true in time of war, when our carefully crafted system of checks and balances must accommodate the vital needs of national security while guarding the liberties the Constitution promises all citizens. *See id.* at 234 (Murphy, J., dissenting) ("Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support."). I believe that our court has failed in this case to carry out this most important responsibility. I would require a greater showing from the Executive before I would permit an American citizen, held in the United States, to be imprisoned indefinitely, without ever being afforded the opportunity to appear in court, contest the allegations against him, or consult with a lawyer.

It is for all of these reasons that I respectfully dissent from the court's denial of rehearing *en banc*.[9]

[9] Contrary to Judge Wilkinson's suggestion in his concurrence, I do not question that Articles I and II delegate decisions as to the conduct of war and national defense to the Executive and Legislative branches of our government, and that we owe deference to those decisions. But deference to the political branches does not compel the Judiciary to abdicate its own duty to protect the individual liberties guaranteed all citizens. My disagreement with the panel decision is that Hamdi has not received the meaningful judicial review to which the panel acknowledges he is entitled. Such review is possible only if the Executive is required to substantiate its contentions that Hamdi is an enemy combatant with more than a declaration that the panel concedes is hearsay, inconsistent and incomplete. Even in the darkest days of World War II, after the devastating attack on Pearl Harbor, the Supreme Court recognized a greater role for the courts in safeguarding individual liberties than the panel now provides Hamdi. *See, e.g.*, *Quirin*, 317 U.S. at 46. After all, "[i]mplicit in the term 'national defense' is the notion of defending those values and ideals which set the Nation apart." *Robel*, 389 U.S. at 264. I regret that in the name of deference to the political branches' preeminence in matters of war, the panel permits the subversion of the very liberties that make defense of this Country worthwhile.

(ORDER LIST: 540 U.S.)

FRIDAY, JANUARY 9, 2004

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CERTIORARI GRANTED

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03-6696 HAMDI, YASER E. ET AL. V. RUMSFELD, SEC. OF DEFENSE

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

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